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IN THE

Supreme Court of The United States

October Term, 1956

In the Matter of INLAND GAS CORPORATION, *Debtor*,	In Bankruptcy
In the Matter of KENTUCKY FUEL GAS CORPORATION, *Debtor*,	
In the Matter of AMERICAN FUEL & POWER COMPANY, et al., *Debtors.*	

PETITION OF ALLEN COMMITTEE AND EDWARD D. SPILMAN (AMERICAN FUEL STOCKHOLDERS) FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 29, 1957

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RECORD REFERENCE

The "Certified Record on Petition for Writ of Certiorari" furnished by the Clerk of the Court of Appeals is not paged. Consequently references to the appendices filed pursuant to Rule 21(3) of this court designate documents without page numbers. The principal appendices referred to by abbreviations include:

Tr. App.—Appendix of Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation; and Clinton M. Harbison, Trustee of American Fuel & Power Company, et al., appellants, filed June 29, 1956,—the second appendix in the Certified Record.

Allen App.—Appendix of Allen Committee and Edward D. Spilman, Representing Stockholders of American Fuel & Power Company, filed July 2, 1956, —the fourth appendix in the Certified Record.

Allen App. filed August 30, 1956—Appendix to Reply Brief of Allen Committee, filed August 30, 1956, —the last appendix in the Certified Record.

Petition Below—Petition and Motion of Allen Committee and Edward D. Spilman for Leave to Propose Provisions in Plan of Reorganization, filed July 2, 1956,—the sixth document in the Certified Record.

App. Kentucky Comm. Pet. for Rehn.—Appendix to Petition of Appellants, The Committee for the Holders of 6½% Debentures of Kentucky Fuel Gas Corporation and Paul E. Kern, for Rehearing, filed March 5, 1957,—the third from the last document in the Certified Record.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Elmo E. Allen and George Greenwald, the surviving members of a Committee of Stockholders of American Fuel & Power Company, ("Allen Committee") and Edward D. Spilman, a stockholder of American Fuel & Power Company, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled procedings on February 14, 1957.

OPINION BELOW

The District Court wrote no opinion. Its order filed March 14, 1956, affirmed by the Court of Appeals, is found in Tr. App. 100-102. The opinion of the Court of Appeals is reported in 241 F. 2d 374. It is printed as Appendix A, *infra*, p. 25.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 14, 1957. The time for filing this Petition was extended to July 13, 1957 by order of Justice Harlan entered April 22, 1957. The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether the bankruptcy court in a Chapter X reorganization should exercise its broad equity powers to classify as superior to stockholders' rights, claims against the debtors acquired by a huge gas utility distributing natural gas and which owns stock control of all the debtors, although the claims (and stock control) were acquired by the utility for the express purpose of precipitating bankruptcy in a cold-eyed, ruthless and entirely successful plan to destroy the debtors and acquire their property in violation of the antitrust laws and fundamental equities; or whether the assets of the debtors remaining after all other creditors have been paid should go to innocent but wronged stockholders of the debtors rather than the guilty creditor.

2. Whether the "absolute priority" rule of this court in bankruptcy reorganization requires that the interest of stockholders of corporations in reorganization be given priority over the claims of creditors of a distinct but related corporation, where the District Court has made positive findings approved by the Court of Appeals that there was no over-reaching which will justify disregard of corporate entities.

This question will not be reached unless question 1 is reviewed.

3. Whether the bankruptcy court can properly refuse to reconsider earlier decisions which at the time handed down amounted to disallowance of claims acquired in violation of law and fundamental equities, but which vastly changed conditions have given vitality, when the earlier decisions were based on an incomplete record which has since been supplemented, and upon doubtful construction of decisions of this court.

STATUTES INVOLVED

The statutory provisions involved are Section 2(2) of the Bankruptcy Act, 66 Stat. 420, 11 U.S.C. § 2(2), Section 57k of the Bankruptcy Act, 52 Stat. 866, 11 U.S.C. § 93(k) and Section 221(2) of the Bankruptcy Act, 52 Stat. 897, 11 U.S.C. § 621 (2). These statutes are printed as Appendix B, *infra*, p. 50.

STATEMENT

The jurisdiction of the District Court was invoked because questions arise under the Bankruptcy Act.

This petition seeks review of the judgment of the Court of Appeals dismissing a petition in that court by these petitioners to permit them to propose provisions of a plan of reorganization of the debtors which will require modification of earlier judgments of the Court of Appeals. These earlier judgments were handed down under circumstances radically different from those existing at the time the petition was filed below (see *Bailey* v. *Proctor*, 1 Cir., 166 F. 2d 392, 396 (1948), for procedure). The petition below appears as the sixth document in the Certified Record.

A motion to dismiss the petition was sustained by the Court of Appeals.[1] Separate written opinions were written by each of the three judges who heard the case below. The only opinion dealing with the petition below was by Chief Judge Simons and his only comment on it was:

> "* * *. Undoubtedly, the petitions, (sic) if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed." (App. A, p. 38).

The petition below was made to the Court of Appeals thoroughly familiar with the record showing the history of the debtors and the background of the various claims. Since this court cannot be as familiar with these matters as is the Court of Appeals, some statement of the background, as shown by the record, is

[1]Petitioners also appealed, but apparently the Court of Appeals decided the issues raised by the Allen Committee on the petition. The record shows no disposition of the appeal.

necessary. We shall try to keep to decent length this statement covering complicated transactions and more than a quarter of a century of litigation.

This case has probably been in court longer than any bankruptcy reorganization now pending. Receivers for Inland Gas Corporation and Kentucky Fuel Gas Corporation were appointed December 2, 1930. A receiver for American Fuel & Power Company was appointed March 1934.[2] Reorganization followed first under Section 77B and later under Chapter X of the Bankruptcy Act. Material issues have been before the Court of Appeals for the Sixth Circuit at least nine times and before the Court of Appeals for the Third Circuit. Numerous petitions for certiorari have been denied by this court and one petition granted. The reported opinions of the Federal appellate courts having direct bearing on creditors' rights with a brief note concerning the holdings are listed in App. C, *infra*, p. 51.

The Parties

The debtor, Inland Gas Corporation ("Inland") was organized in 1927 to produce and sell gas to industrial consumers. It sold First Mortgage Bonds and Debentures to the investing public and acquired substantial gas producing properties and distribution facilities. The common stock was held by the organizers and underwriters.[3]

Kentucky Fuel Gas Corporation ("Kentucky") was

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[2]Allen App. p. 60-A.

[3]Allen App. p. 52-A, *et seq.*

organized in 1928 by certain Inland stockholders. Kentucky sold to the public First Mortgage Bonds and Debentures and with the proceeds acquired substantial physical properties and about 26% of the Inland stock.[4]

American Fuel & Power Company ("American") was organized later in 1928 by certain stockholders of Inland and Kentucky. These stockholders exchanged their Inland (72.6%) and Kentucky stock (91%) for American stock which, with stock of small subsidiaries organized by American, was pledged to secure an issue of Gold Notes sold to the public.[5] The money thus obtained was used to help finance the operating subsidiaries, Inland and Kentucky.[6]

Columbia Gas & Electric Company, later by change of name Columbia Gas System, Inc. ("Columbia") was at this time a huge utility, dominating the sale and distribution of natural gas in the area served by the debtors.[7] In violation of the antitrust laws, it has acquired 76% of the American stock (and with it control of the other debtors) and large claims against all of the debtors.[8]

Other principal parties are the holders of the debt obligations of American, Inland and Kentucky, other

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[4]Allen, App. p. 57-A, *et seq.*

[5]Allen App. p. 60-A, *et seq.*

[6]"* * * American Fuel was organized in part at least to provide funds for Inland and Kentucky Fuel to meet their respective obligations. * * *" *In re. Inland Gas Corp.*, 92 F. Supp. 810 (E. D. Ky., 1949) (Allen App., 5 C, Filed Aug. 30, 1956—Certified Record).

[7]District Court findings, Allen App. 1-A.

[8]District Court findings, Allen App. 8-A.

than Columbia, and the minority stockholders of American represented by these petitioners.[9]

Properties and Claims

The only substantial assets before the court are now held by Inland.[10] The two latest appraisals value them at $11,200,000 and $8,000.000.[11]

Inland has discharged all its debts except those owing to Columbia. These Columbia claims have been subordinated to the claims of public creditors of *all* the debtors[12] but are now classified as superior to the interest of stockholders. The claims held by public security holders of the debtors and some common claims have been allowed.

Columbia's Claims

In the early days of the existence of these companies, the income of American and its operating subsidiaries ("American Fuel System") was insufficient to service the System's debts. In order to increase income, an ambitious program to increase gas sales was under-

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[9]Since the stock ownership in the debtors is vital, it is summarized. American holds practically all the stock in stock of Kentucky, 72.6% of the Inland stock and controls, through its subsidiary, Kentucky, 26% of the Inland stock. Since American owns nearly all the stock in the subsidiaries and its stock is owned 76% by Columbia and 24% by others represented by these petitioners, the minority stockholders of American represented by these petitioners are the only stockholders of the American Fuel System other than Columbia, who have a substantial stock interest

[10] American never owned substantial physical properties; only stock in operating companies (Allen App. 60-A). Kentucky once owned large properties, but these were sold in these proceedings and the proceeds distributed to Kentucky bondholders. (Allen App. 57-A).

[11]Petition Allen Committee in the Court of Appeals, p. 14.

[12]*Columbia Gas & Electric Corp.* v. *United States*, 6 Cir., 151 F. 2d 461 (1945), cert. denied, 329 U. S. 737.

taken, including an expensive pipe line from eastern Kentucky to the area of Detroit, Michigan. The financing of this program required a new issue of stock of American (one million shares) to a "Syndicate" consisting of engineers and bankers which gave the Syndicate control of the American Fuel System.[13]

At this time Columbia was a huge utility, producing, selling and distributing natural gas. It held a virtual monopoly in the territory which the American Fuel System proposed to serve. The new American Fuel System aggressively challenged that monopoly. It was successful in taking important customers away from Columbia and threatened, through the Detroit pipe line, to take other customers and prospective customers in the area between Huntington, West Virginia and Detroit.

In the days of the buccaneering monopolies in the late twenties, this was not to be tolerated by Columbia, the huge and dominant utility in the area invaded by the upstart. It was not tolerated. Although Columbia had kept itself fully informed about the financial troubles of the American Fuel System it bought in the open market at practically par enough of Inland and Kentucky Bonds to permit Columbia to declare default if its fixed debt charges were not met, with the intention of buying the system at forced sale. It also bought a substantial amount of Debentures of both companies. The Syndicate, however, prevented default in the Bonds

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[13]Columbia's transgressions, as stated here, are covered in detail in the Findings of Fact and Conclusions of Law by the District Court filed September 3, 1943 (Allen App. 1-A through 12-A) affirmed in *Columbia Gas & Electric Corp.*, 6 Cir., 151 F. 2d 461 (1945). See also *In re. American Fuel & Power Co.*, 6 Cir. 122 F. 2d 223 (1941). The court is directed particularly to the District Court's Findings for a thorough but reasonably concise statement of Columbia's activities.

by an agreement with the debtors to advance sufficient funds to meet current fixed charges and began construction of the pipe line to Detroit. This meant that in order to destroy the American Fuel System the Syndicate must be dealt with. It was Columbia conspired with the Syndicate to buy its holdings in the American Fuel System (which carried control of all of the companies) for nearly $3,000,000, a price which gave the Syndicate a large profit ($350,000) and, as further inducement, entered into agreements with some of its members which gave them large benefits. (Allen App. 8-A).

Columbia's nominees were promptly installed as directors and officers of all the companies. These nominees, in utter disregard of the security holders and stockholders who had not been bought out, instituted receivership proceedings before any default in the Bonds or Debentures. Nominees of Columbia were appointed receivers and, as the Circuit Court found, "(f)or a considerable period, the activities of the receiver of Inland, Kentucky Fuel and also of American Fuel and its other subsidiaries, both of whom were nominees of Columbia, were largely dominated by Columbia." (Allen App. 10-A). The Columbia-dominated officers and the Columbia-dominated receivers abruptly cancelled all expansion plans.[14] This, as Columbia knew and intended, made bankruptcy of the debtors inevitable and ended the threat of competition. Columbia later built a pipe line to, and took over, the Detroit market, free from competition by the American Fuel System (see 122 F. 2d p. 226).

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[14]These Columbia-dominated receivers permitted the statute of limitations to run on a suit for tripple damages for violation of the antitrust acts. *Williamson* v. *Columbia Gas & Electric Corporation*, 3 Cir., 110 F. 2d 15 (1939), cert. denied 310 U. S. 639.

Both the District Court and the Court of Appeals have consistently held that the acquisition by Columbia of control in the American Fuel System and the acquisition of the obligations of the debtors, which it now seeks to enforce, were obtained in the course of a conspiracy to restrain actual and potential competition in the production, transportation, distribution and sale of natural gas in violation of the Sherman and Clayton Acts and that all securities in, and stock control of, the debtors were bought by Columbia as a part of the illegal and inequitable course of action. (See Allen App. 11-A).

The Petition

With this background, we consider the petition which was dismissed in the Court of Appeals. Since no fact alleged was challenged and it was dismissed on motion, its allegations must be considered true.

After alleging facts covered above, the petition (par. 4) shows:

(a) In 1941, in a proceeding in which Columbia was not a party, the Court of Appeals completely disallowed and rejected all claims and stock interests of Columbia in the debtors because of its illegal and inequitable conduct. *In re. American Fuel & Power Company*, 122 F. 2d 223.

(b) In 1945 after full hearing, in a proceeding in which Columbia was before the court, the District Court held that Columbia had acquired all of its claims and stock interests in the debtors in violation of law and fundamental equities. The record then showed that Inland's

assets were insufficient to pay Inland's debts. The Court of Appeals in *Columbia Gas & Electric Co.* v. *United States*, 6 Cir., 151 F. 2d 461 (1945), considering itself bound by *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, decided by this court after the earlier decision, modified its prior holding to require *subordination* of Columbia's claims against Inland to the claims of holders of Inland's obligations, sold to the investing public ("public creditors").[15] It did not, as in the 1941 decision, reject them completely.[16] Though the Columbia's claims were only subordinated to claims of public creditors, the practical result was disallowance since, as the court noted, the Inland assets were then not sufficient to pay the claims of Inland's public creditors.

(c) After the 1945 decision the circumstances changed greatly. New sources of gas and increased sales contracts greatly increased Inland's income. The District Court then construed the mandate of the Court of Appeals in the 1945 case to require subordination of the Columbia claims only to the claims of public creditors of *Inland* (to the exclusion of public creditors of the other debtors) and approved a plan of reorganization which permitted Columbia to receive all the assets of Inland remaining after Inland's public creditors had been satisfied. Five appeals followed, *In re. Inland Gas Corp.*, 187 F. 2d 813 (1951) in which the Court of Appeals reversed. Over the objection of S.E.C. (187 F. 2d, p. 817) the Court of Appeals again

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[15]The portion of the opinion covering the *Hartford-Empire* case and subordination of Columbia's claims is found at Appendix D to this petition, *infra*, p. 53.

[16]Complete rejection was urged by the Attorney General of the United States who had intervened because of Columbia's violation of the antitrust laws and by S. E. C. *Columbia Gas & Electric Corp.* v. *United States*, 6 Cir., 151 F. 2d 461, 463 (1945).

refused to reject or disallow Columbia's claims completely or subordinate them to the stock interests in Inland (American 72.6%, Kentucky 26%, public 1.4%). It held that creditors of American and Kentucky, other than Columbia, were "creditors or quasi creditors" of Inland and classified their "quasi creditor" claims against Inland as superior to Columbia's claims and the interests of Inland stockholders. The "quasi creditor" claims of American and Kentucky creditors (other than Columbia) were measured by the stock holdings of American and Kentucky in Inland.[17] The record then before the court showed that the assets of Inland were sufficient to discharge all Inland's debts except those held by Columbia and to make partial payments to American and Kentucky "quasi creditors". The result was to deny Columbia participation.

(d) Pursuant to the mandate of the Court of Appeals, the proceedings were remanded to the District Court. But circumstances continued to change. Inland's earnings increased greatly. It then appeared that if, after payment of all public claims against Inland the remaining ("surplus") assets should flow to the stockholders, American would receive 72.6% of the surplus which, when added to American's assets, would pay all American creditors and leave an "overage" available to American stockholders. The Court of Appeals affirming the District Court met this change in circumstances by decreeing that the overage of Inland's assets moving to American by reason of its holding of Inland stock should not go to American stockholders but should be used to discharge claims of public creditors of Kentucy. *In re. Inland Gas Corp.*

[17]The portion of the opinion dealing with the "quasi creditor" claims against Inland of American and Kentucky public creditors is copied at Appendix E, *infra*, p. 56.

211 F. 2d 381 (1954).[18] Columbia again was denied participation.

(e) All subsequent plans of reorganization and decisions of both the District Court and the Court of Appeals have followed this law.

Substantial changes in economic conditions since January 1, 1952 (the date as of which the court had last considered the Inland operations) are averred. Since that date:

(a) Inland had acquired large additional sources of gas and entered into long term sales contracts which greatly increased its income.

(b) The price of gas had risen greatly, increasing the value of Inland's locally produced gas and the value of local gas reserves.

(c) Debts on receiver's certificates in the amount of $2,700,000 had been discharged.

(d) Firm offers to begin bidding for the System assets at a public sale had progressively increased from $6,350,000 to $8,000,000.

(e) Creditors had rejected a plan of reorganization calling for an opening bid of $8,000,000 because, as petitioners are advised, the $8,000,000 bid was much less than the value of the American Fuel System.

(f) Available cash had greatly increased and will continue to increase.

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[18]The basis of the opinion of the Court of Appeals seems to be:

"• • •. We perceive no unfairness in assigning the overage of American's assets to Kentucky's security holders who are equitably beneficiaries of Columbia's subordination." 211 F. 2d 381, 384.

(g) The Allen Committee had been advised by financially responsible persons that if Columbia is eliminated, they proposed to underwrite a plan of reorganization which will pay off in cash all the public creditors of all of the companies and leave something for stockholders.

(h) Under a ruling of the Director of Internal Revenue that a reorganization based upon a sale would not be tax free unless stockholders participate, a plan of reorganization which eliminates stockholders will result in depletion of the debtors' assets by nearly $1,200,000 in taxes.

(i) Appraisal by a qualified gas engineer who testified in these proceedings showed a fair value of the American Fuel System of $11,200,000 which is more than enough to pay all public creditors of the System and leave an equity for stockholders. In addition, the Allen Committee had been advised that Carbide & Carbon Chemicals Corporation will purchase the higher hydrocarbons from the Inland gas, which will bring large additional income and an additional value not considered in any appraisals.

It is on this showing of changed conditions that petitioners urge review of the refusal of the Court of Appeals to permit the District Court to re-examine earlier holdings.

The other allegations of the petition raise matters of law which will be covered in the argument section and need not be discussed here.

The result of dismissal of the petition below is to establish as the law of this case, binding upon the District Court, the principle that Columbia as a

subordinated creditor will participate in the assets of the debtors to the exclusion of innocent stockholders. But Columbia was "subordinated" at a time when subordination meant rejection. The judgment below, sought to be reviewed here, is the first by the Court of Appeals which actually directs that Columbia receive any assets The practical effect of the vast change in circumstances reviewed above and of the judgment below is to breathe life into the tainted claims of Columbia rather than into the legitimate claims of the stockholders.

REASONS FOR GRANTING THE WRIT

1. Allowance of Columbia Claims

The decision of the court below holding that a bankruptcy court will allow claims held by Columbia against the debtors which were acquired in violation of the antitrust laws, contrary to all equities and for the express purpose of eliminating the debtors as competitors, presents an important question of Federal law which has not been, but should be settled by this court. We know of no decision of this court requiring disallowance in bankruptcy of bonds, debentures or other claims which, together with stock control of the debtors, were acquired by a claimant for the purpose of destroying the debtors in violation of law. But the judgment of the Court of Appeals allowing Columbia's claims is in conflict with the rationale of *Pepper* v. *Litton*, 308 U. S. 295, which firmly establishes the power and duty of the bankruptcy court to withhold its aid in the collection of claims obtained by fraud and grossly inequitable conduct.

The principles established by *Pepper* with which the decision below conflicts are that:

> "* * *In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate. And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder. That is clearly the power and duty of the bankruptcy courts under the reorganization sections. * * *". (pp. 307-308).

In determining whether to allow or disallow a claim in bankruptcy:

> "* * * a sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant; * * *". (pp 310-311).

The plan of reorganization directed by the District Court which will allow Columbia to recover from the debtors money which it paid to destroy them cannot be "fair and equitable" as required by § 221(2) of the Bankruptcy Act. Certainly there is no *equity* in Columbia's claims.[19] The Court of Appeals recog-

[19]We note that Columbia paid nearly three million dollars to ruin the debtors and to destroy the interest of the stockholders, as well as creditors. The judgment below permits recovery of blood money from the victims. As Judge Hamilton put the matter in reversing a District Court approved settlement which allowed partial recovery by Columbia:

> "The facts in the record impel the conclusion of this court that Columbia's conduct was for the purpose of destroying the debtors and their subsidiaries, and that by its acts, it drew to itself the lifeblood of all the debtors and picked the flesh from the bones of these corporate entities and now, under the terms of the settlement approved by the lower court, is to have a share of the skeletons."

In re. American Fuel & Power Co., 122 F. 2d 223, 228 (App. Kentucky Comm. Pet. for Rehn. plea et seq. which collects the statements of the Court of Appeals in several cases on Columbia equities).

nized this but held in *Columbia Gas & Electric Corporation* v. *United States*, 6 Cir., 151 F. 2d 461 (1945), that this court's decision in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, denied the bankruptcy court the *power* to reject Columbia's claims. (See App. D). This holding, given effect by the opinion below, should be reviewed since it is contrary to principles established by *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (which came to this court in these proceedings), that a bankruptcy court may reject a claim as a matter of policy of the Bankruptcy Act. There this court refused allowance in bankruptcy of interest on interest payable to Inland bondholders although there was, and could be, no question of fraud or inequity in the origin of the interest claim. The question asked in the majority opinion was

> "* * * whether allowance of the claim would be compatible with the policy of the Bankruptcy Act." (p. 162).

The answer was No, because:

> "* * * we think an allowance of interest on interest under the circumstances shown by this case would not be in accord with the equitable principles governing bankruptcy distributions." (p. 163).
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> * * * *
>
> "In this case, where by order of the court interest was left unpaid, we do not think that imposition of interest on that unpaid interest can be justified by 'an application of equitable principles' ". (p. 165)

Cf. *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445.

The importance of the question of the power of a bankruptcy court to disallow Columbia's claims obtained, as noted above, need not be labored. In *Pepper* v. *Litton*, *supra*, certiorari was granted because of an apparent restriction imposed by the decision of the court below on the power of the bankruptcy court to disallow or to subordinate an indefensible claim. That claim was allowed because the Court of Appeals considered itself bound by a prior state court decision establishing its validity. An equally important question is presented here and one very similar to that in *Pepper* since the holding that Columbia's claims may not be allowed or rejected is based upon an erroneous conception of this court's decision in *Hartford-Empire*.[20]

2. Kentucky Creditors as "Quasi Creditors" of Inland and American

The judgment of the Court of Appeals directing classification of the claims of Kentucky creditors in the assets of Inland and American as superior to the interest of the stockholders of these debtors is in conflict with the "rule of absolute priority" firmly imbedded in the law of bankruptcy reorganizations by *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, and *Consolidated Rock Products Co.* v. *duBois*, 312 U.S. 510.[21] This rule requires that claims against bankrupt

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[20] *Hartford-Empire* is clearly distinguishable and should not have been held to deprive the bankruptcy court of power to disallow or reject Columbia's claims for the reasons given by the Court of Appeals (187 F. 2d 813, 817, App. D, *infra*, p. 53) and for the more significant reason that it was not a bankruptcy case and as this court held in *Vanston* did not present to the court below "* * * the special bankruptcy problems of uniformity, ratable distribution and fairness and equity which grow out of the context of the bankruptcy law." (329 U. S. 156, 165 n. 9).

[21] This rule is often referred to in the cases and by writers as the "fixed principle of the Boyd case". See *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482 (1913).

corporations having priority by contract must be allowed in full in the order of priority established by contracts before junior contracts rights are enforced. Implicit in the rule must be a requirement that after senior contract rights have been attended to the junior contract rights must be enforced in the order in which the contracts arrange them. The absolute priority rule prevents stockholders from recovering on their stock interest until after all cerditors' claims have been discharged. Surely that rule also requires that after creditors' claims have been discharged the stockholders are entitled to the remaining assets to the exclusion of outsiders. The judgment here sought to be reviewed ignores the separate entities of the debtors and disregards the stockholders' rights to priority in directing that after Inland's creditors have been paid, Inland's surplus assets shall be used to discharge claims of Kentucky creditors to the exclusion of Inland (and American) stockholders.

We do not contend that under no circumstances can a bankruptcy court disregard corporate entities in order to do justice. Cf. *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307. We do contend that imperative equities must be found to justify taking assets of one corporation from its stockholders and awarding them to creditors of another, though related, corporation. No such imperative equities exist here. To the contrary, the court below after considering all the equities has found that the corporate entities of the debtors must be respected.[22]

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[22] *In re. Inland Gas Corp.*, 6 Cir., 211 F. 2d 381 (1954) rejected the position of the Kentucky creditors that corporate entities should be disregarded and Inland's assets be made available for the payment of claims of Kentucky

The reasons given by the Court of Appeals for classifying Kentucky creditors as "quasi cerditors" of Inland are demonstrably unsound. *In re. Inland Gas Corp.* 187 F. 2d 813, 817 (1951), (Opinion, App. E, p. 56) rested this strange quasi creditor concept on the *inference*, said to be inescapable, that Inland stock was pledged to support Kentucky and American securities and that "the main reliance of the public investors in such securities must have been the Inland stock, based upon Inland assets and pledged for their benefit by American and Kentucky." (187 F. 2d, 813, 817; App. E, *infra*, p. 56.)

But the record directly contradicts this inference. The only security offered to the Kentucky creditors was a mortgage on Kentucky properties and claim to Kentucky earnings. (Offering Letter of Kentucky bonds, Allen App. 14-A; and Offering Letter of Kentucky debentures, Allen, App. 19-A). The Inland stock was purchased by Kentucky after the bonds and debentures were sold with money received from their sale. Nothing in the record indicates that any public purchaser of Kentucky securities had the slightest idea that money received by Kentucky for these securities would be used to purchase Inland stock. The record shows affirmatively that, contrary to the "inference" of the Court of Appeals, no Inland stock was pledged to secure any Kentucky claims (Allen App. p. 88-A).

A possible reason for disregarding the corporate entities might be that Kentucky was a mere instru-

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and American *pari passu*. In the opinion (p. 383) the court said that in an earlier opinion

> "* * * we gave careful consideration to the interrelationship of the three corporations, reviewed their history and the details of their capital structure. We recognize them as independent corporate entities. * * *".

mentality of Inland. But both the Court of Appeals and the District Court agree that the corporate entities of the several debtors were always kept distinct. Kern, a holder of Kentucky securities, contended both in the District Court and the Court of Appeals that the instrumentality rule should be applied here. The District Court rejected such contention and was affirmed in *In re. Inland Gas Corp.*, 208 F. 2d 13 (1953). The Court of Appeals stated flatly (p. 16)

> "* * * Kentucky was not the instrumentality of Inland. * * * *".

Cf. *In re. Inland Gas Corp.*, 211 F. 2d 381, 383 (1954).

A third possible reason for disregarding the corporate entities might be overreaching by parent to the injury of Kentucky creditors. Both courts below have repeatedly held that there was no such overreaching. The District Court's opinion, filed October 1, 1949 (92 F. Supp. 810, 818; Allen App. 5C—Filed Aug. 30, 1956), considering a contention by holders of Kentucky obligations that American claims against Inland for money advanced to it should be subordinated to the claims of Kentucky creditors, reads:

> "* * *. There is nothing in the record to sustain or justify any conclusion that Inland, or its creditors, were in anywise injured or overreached by American Fuel in the making of said advancements."

The effect of the decision of the Court of Appeals is to deny to American stockholders the benefit of the rule of absolute priority. This court has never held that the

rule extends beyond creditors to stockholders. The question of whether or not that rule protects stockholders is important and should be decided.

3. Review of Earlier Decisions By Reason of Change in Circumstances

The Court of Appeals sustained a motion to dismiss the petition of the Allen Committee below only because granting it would mean re-examination of earlier decisions made when the financial circumstances of the debtors were very different than those which existed when the decision was made. In spite of the clear showing that the change in circumstances had created values for stockholders, the court below refused to allow reconsideration of its earlier decisions made when, as a practical matter, substantial stockholders' rights were not involved. The creation of artificial "quasi creditors" of Inland at a time when no stockholders' substantial rights could be affected had the effect of destroying stockholders' interests when they did arise years later.

If the court below had held that the changes in circumstances were insufficient to justify reconsideration of earlier decisions, the only question which could be reviewed would be abuse of discretion. But the refusal of the court below to consider whether the vast change in circumstances required reconsideration of its earlier decisions calls for the exercise of this court's power of supervision.[23]

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[23]That change in the financial circumstances of the debtors may vitally affect stockholders' interests is too clear to require argument. Cf. *Knight* v. *Wertheim & Co.*, 2 Cir., 158 F. 2d 838 (1946), cert. denied, 331 U. S. 818

OTHER PETITIONS FOR CERTIORARI

This petition considers only a few of the questions decided by the court below. Certain creditors petitioned the Court of Appeals for rehearing which was denied May 8, 1957. (Per Curiam opinion in Certified Record) Petitions for certiorari will unquestionably be filed in this court to review other questions. The time for filing such petitions will not run until August 6, 1957. It is respectfully suggested that consideration of the questions raised by this petition be postponed until the other petitions are before the court.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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SPILMAN, THOMAS, BATTLE
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Of Counsel

June 29, 1957

(1947); opinion of Justice Reed unofficially reported *In re. Equitable Office Building Corporation*, 96 L. ed. 1386 (1946), where the Justice wrote:

> "* * *. A court of reorganization guards with equal solicitude the equity of stockholders and the priority of creditors". (p. 1390).

Portions of this opinion are found, Allen App. 1 C filed Aug. 30, 1956—Certified Record.

APPENDIX A

Nos. 12861-12867

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re INLAND GAS CORPORATION, *Debtor,* In re KENTUCKY FUEL GAS CORPORATION, *Debtor,* In re AMERICAN FUEL & POWER COMPANY, ET AL., *Debtor,*	APPEALS from an Order of the United States District Court for the Eastern District of Kentucky In Bankruptcy

Decided February 14, 1957

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge

After more than twenty six years of Reveiver and Trustee operation of the Debtors' properties, of litiga-

tion delaying reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas & Electric Corporation v. United States, 6 Cir., 151 F.2d 461, modification denied, 6 Cir., 153 F.2d 101, certiorari denied 329 U.S. 737, 67 S. Ct. 48, 91 L.Ed. 636; In re Inland Gas Corporation, 6 Cir., 187 F.2d 813; In re Inland Gas Corporation, 6 Cir., 208 F.2d 13; In re Inland Gas Corporation, 6 Cir., 211 F.2d 381, certiorari denied Kern v. Williamson, 348 U.S. 840, 75 S.Ct. 45, 99 L.Ed. 662; In re Inland Gas Corporation, 6 Cir., 217 F.2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan en-

titled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable, and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Cour circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modifications. The important new developments consisted of substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offred $8,000,000.00 in cash for the same properties which it confirmed by a

deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation of the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purpose of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decsion s correct, the Federal tax involved would be approximately $1,192,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these

rulings and as an assumed result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory

judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202, it was without jurisdiction to entertain it. Whereupon it ordered that the petition of the Trustees be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors, were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganization corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as avidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unnecessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed," so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its

stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for a successful and prompt reorganization by the $8,000,000.00 offer received by Tennesse. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the

petition, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U.S.C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421, of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C.F.R. § 1.337-2(b). The problem with which § 337 was concerned arose out of the dicisions in Commissioner v. Court Holding Co., 324 U.S. 331, 65 S. Ct. 707, 89 L.Ed. 981, and United States v. Cumberland Public Service Co., 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the

taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re American Fuel & Power Co., 6 Cir., 151 F.2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F.2d 813, 819, we said: "The order will be amended by direction to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered

to those rulings. 217 F.2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) If the alleged bankrupt proves solvent, post-bankruptcy interest is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bank-

ruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period of different of opinion as to allowance of interest on tax claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the lights of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr. Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S.Ct. 237, 241, 91 L.Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F.2d. 266 certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, and its predecessor, Taylor v. Standard Gas & Electric Co. 306 U.S. 307, 618, 59 S.Ct. 543, 83 L.Ed. 669, that, as said in Sampsell, 313 U.S. at page 219, 61 S.Ct. at page 907, "The power of the bankruptcy court

to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further obesrvation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F.2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation, for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan

or reorganization, which may or may not contain a provision for sale of the properties, or which may or may no submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems h re involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted, we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debenture asks us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer

thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12865, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, Circuit Judge.

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to

the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 163, 67 S. Ct. 237, 91 L.Ed. 162; Sexton v. Dreyfus, 219 U.S. 339, 344, 31 S.Ct. 256, 55 L.Ed. 244; City of New York v. Saper, 336 U.S. 328, 330-331, 69 S.Ct. 554, 93 L.Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U.S. 261, 267, 34 S.Ct. 502, 58 L.Ed. 949; City of New York v. Saper, supra, 336 U.S. 328, at page 330, 69 S.Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle of the debt secured, the excess should be applied to post-bankruptcy interest on the obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F.2d 611, 613, certiorari denied McInnis v. Weeks, 345 U.S. 958, 73 S.Ct. 940, 97 L.Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky

are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 and Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp., 5 Cir., 149 F.2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower

rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On th ecntrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York v. Saper, supra, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U.S.C.A. The Court said 336 U.S. at page 337, 69 S.Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64; sub. a, and 57, sub. n [11 U.S.C.A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X, United States v. Edens, 4 Cir., 189 F.2d 876, affirmed 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F.2d 80, affirmed 342 U.S. 912, 72 S.Ct. 358, 96 L.Ed. 682; Pavone Textile Corp. v. Bloom, 302 N.Y. 206, 97 N.E.2d 755, affirmed sub nom., United States v. Bloom, 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F.2d 10, certiorari denied 342 U.S. 918, 72 S.Ct. 364, 96 L.Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F.2d 865, certiorari denied

348 U.S. 830, 75 S.Ct. 53, 99 L.Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F.2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp., supra., 5 Cir., 149 F.2d 199; United States v. Paddock, 5 Cir., 187 F. 2d 271, 276; Application of Progress Shoe Co., D.C.E.D.N.Y., 107 F.Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N.E. 2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U.S. 156, 67 S.Ct. 237, 240, 91 L.Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U.S. at page 166, 67 S.Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of the debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F.2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, lends some

support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, Circuit Judge.

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28, U.S.C. provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * * upon the filing of an appropriate pleading, may declare

the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies: and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court sit-

ting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concering the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule." The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. * * *"

Study of the history of the Act reveals that the words "except with respect to Federal taxes" upon which this issue turns were not a part of the original staute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori*, an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U.S.C., as follows: "§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee of the debtor corporations is on the same footing with any other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solvent* corporation engaged in a reorganization may have an equally large amount of tax liability, contingent upon the outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *insolvent* corporation should be in a pre-

ferred position. The possible loss of a favorable business transaction is insufficient reason of itself to create the extraordinary circumstances necessary for the injunctive relief sought by appellent. The Internal Revenue Code of 1954, section 7421, states the general rule: "(a) Tax. * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This restraint against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence,, a suit may be maintained to enjoin the collector." Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509, 52 S. Ct. 260, 263, 76 L.Ed. 422.

This court has held that any exception to the universality of the application of section 7421 of the Internal Revenue Code must turn upon "present extraordinary and entirely exceptional circumstances." John M. Hirst & Co. v. Gentsch, 6 Cir., 1943, 133 F.2d 247, 248. We stated there that the "circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued." In my judgment, departure from the clear statutory prohibition is not warranted in the present circumstances.

Inasmuch as the United States District Court had no jurisdiction over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commission-

er as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reason stated by him, that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax, liability for lack of jurisdiction should, in my judgment, be affirmed.

APPENDIX B

STATUTES

Sec. 2 of the Bankruptcy Act, 66 Stat. 420, 11 U. S. C. § 2:

> § 2. *Creation of Courts of Bankruptcy and Their Jurisdiction.* a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respectve terms, as they are now or may be hereafter held, to—
>
> * * *
>
> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; * * *"

Sec. 57.k. of the Bankruptcy Act, 52, Stat. 866, 11 U. S. C. § 93(k):

> "k. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

Sec. 221(2) of the Bankruptcy Act, 52 Stat. 897, 11 U. S. C. § 621(2):

> "Sec. 221. The judge shall confirm a plan if satisfied that—
>
> * * *
>
> (2) the plan is fair and equitable, and feasible;"

APPENDIX C

LIST OF CERTAIN DECISIONS OF FEDERAL APPELLATE COURTS IN THESE PROCEEDINGS

The notes following the cases below on the holdings are not intended to indicate all of the issues decided in any case but only those thought to have the most significant bearing on matters raised in this petition:

Hamilton Gas Co. v. *Inland Gas Corp.*, 6 Cir., 102 F. 2d 131 (1939), cert. dismissed 308 U. S. 628, considering contract liability of Inland to Hamilton Gas Co.

In re. American Fuel & Power Co., 6 Cir., 122 F. 2d 223 (1941) which *rejected* all claims and stock interests of Columbia.

Columbia Gas & Electric Corporation v. *United States*, 6 Cir., 151 F. 2d 461 (1945), cert. dend. 329 U. S. 737 (1946), holding that Columbia's claims are subordinated to the claims "of all other creditors of every class." Modification denied 153 F. 2d 101 (1946), cert. dend. 329 U. S. 737.

In re. American Fuel & Power Co., 6 Cir., 151 F. 2d 470 (1945), refusing to allow interest on the interest coupons of Inland bonds.

Vanston Bondholders Protective Committee v. *Green*, 329 U. S. 156 (1946), reh. dend. January 13, 1947 affirming decision of Court of Appeals next above.

In re. Inland Gas Corp., 6 Cir., 187 F. 2d 813 (1951), holding *inter alia* that the public creditors of American and Kentucky are "creditors or quasi creditors" of Inland.

In re. Inland Gas Corp, 6 Cir., 208 F. 2d 13 (1953), holding "Kentucky was not an instrumentality of Inland", p. 16.

In re. Inland Gas Corp., 6 Cir., 211 F. 2d 381 (1954), approving order of District Court "assigning the overage of American's assets (aft all American public creditors have been discharged) to Kentucky security holders"—cert. dend. 348 U. S. 840.

In re. Inland Gas Corp., 6 Cir., 217 F. 2d 207 (1954), dismissed motion of Allen Committee to obtain option to purchase stock and for new valuation.

In re. Inland Gas Corp., 6 Cir., 241 F. 2d 374 (1957), review sought here.

Williamson v. *Columbia Gas & Electric Corporation*, 3 Cir., 110 F. 2d 15 (1939), cert. dend. 310 U. S. 639 holding an action for triple damages under antitrust acts, barred by the Delaware three year statute of limitations.

APPENDIX D

Excerpt from opinion *Columbia Gas & Electric Corp. v. United States*, 151 F. 2d 461 (1945):

"* * *

"The argument that the court, for alleged violations of the Anti-Trust Laws imposed in a bankruptcy proceedings penalties other than those specified in the Anti-Trust Statutes, must be rejected. The court imposed no penalties; it but exercised its equity power to deny relief to a creditor seeking enforcement of contracts entered into illegally or tainted with inequity. To apply the doctrine so vigorously urged by Columbia, is to deny the power and duty of equity, to reject demands arising out of illegal or inequitable conduct whenever such conduct is subject to legal penalties imposed by state or federal law, and so to limit it to that narrowly restricted field in which the chancellor may sense inequity even in the absence of statutory condemnation. A denial of this contention does not mean, of course, that the power may be invoked in respect to conduct constituting no wrong to the parties or interests in litigation.

"In our view, Columbia receives no support from the case of Hartford-Empire Co. v. United States, 323 U. S. 386, 65 S. Ct. 373, wherein it was held that the use of patent positions to allocate fields of manufacture and to maintain prices, violated the Anti-Trust Laws and could be restrained, but that the court was without power to compel action, which amounts to a forfeiture of patents. Columbia correctly points out that there is no distinction between a patent and a bond; both are a species of property and neither can be confiscated because of past uses. But its

contention in other respects ignores the fundamental basis of the Hartford-Empire decision which, in line with Morton Salt v. Suppiger and B. B. Chemical Co. v. Ellis, supra, denies enforcement of patent rights against infringers, so long as the patent owner is using his patent in violation of the Anti-Trust Laws. It may well be, under the facts of the Hartford-Empire case, that there remained to the appellants there, property rights which, when their owners had abandoned their illegal use and been purged of inequity, could still be enforced against subsequent infringers. Such rights the court would not allow to be confiscated. This doctrine has no application to the present status of Columbia, at least in respect to the subordination of its claims by the decree. In that respect the decree merely denies enforcement of the Columbia claims precisely as the Hartford-Empire decision denies enforcement of patents illegally used against those infringing during such illegal use. The fruits of Columbia's inequitable activities are still retained in its freedom from competition by American Fuel, and Columbia's suggested remedy would still leave wronged stockholders and creditors without relief, for a restoration of the status quo ante is manifestly now impossible. It may be as suggested by the S.E.C. that, under the facts of the case, the distinction between subordination and rejection is purely academic, but submissiveness in principle to the doctrine of the Hartford-Empire case, perhaps requires an amendment to the decree, limiting the remedy of the petitioners to the subordination of the Columbia claims.

"Lastly is Columbia's contention that there is no basis for subordination of bonds purchased prior to the date when it acquired stock control of American Fuel, that this was an isolated

transaction unrelated to subsequent inequitable conduct. The bond purchase was, however, upon the facts found, supported by credible and persuasive evidence, but the initial step in an integrated policy to preserve Columbia's monopolistic position in the territory here involved, and to prevent and stifle actual or threatened competition by American Fuel. Such bonds have therefore no status superior to the stock or bonds later acquired. In re Kansas City Journal-Post Co., 8 Cir., 144 F. 2d 791." (pp. 469, 470).

APPENDIX E

Excerpt from opinion *In Re. Inland Gas Corp.*, 187 F. 2d 813 (1951):

"* * *

"We are not advised by this record of the circumstances under which or the representations by which the gold notes of American Fuel supported by the pledge of Inland stock, were sold, and the trust indenture under the terms of which they were issued is not here. The inference is inescapable, however, that the main reliance of the public investors in such securities must have been the Inland stock, based upon Inland assets and pledged for their benefit by American and Kentucky. We are aware that some of the appellants contend that at that time Inland stock had little or no value. The fact remains, however, that the investors must have relied, to large extent, upon the assets of Inland. If not, why was Inland stock pledged? The purpose of the issue was to rehabilitate Inland, to save it from debt default and to increase its holdings of gas acreage, and the inference is likewise inescapable that this must have been understood by the investors. Moreover, it now appears that through excellent management by its trustee Inland assets are sufficient to pay all of its debts exclusive of the claim of Columbia, so that the expectation of its rehabilitation was not wholly vain. Besides, the entire reorganization structure now planned rests upon the assets of Inland. So viewing it, we think that the public security holders whose investments were guaranteed and supported by a pledge of Inland stock are, in a very true sense, creditors or quasi-creditors of Inland, and that whatever the formal arrangement may have been a realistic view is that they are entitled

to creditor status in the plan of reorganization. Certainly a court of equity, particularly in a bankruptcy reorganization, has the power and likewise the duty to look through form to substance. Since this creditor status may practically be recognized only through the medium of Inland stock owned by American and Kentucky without raising problems of distribution and priorities, the court is directed to amend the plan of reorganization to subordinate Columbia claims to the stock of Inland and assign the residue of Inland assets over its debts, exclusive of Columbia's claims, to the account of their public creditors according to the respective stock interests of 72.6% for American and 26% for Kentucky. Whether this means that we have subordinated securities to stock or have subordinated them to debts, measured by the respective pledges of stock, seems to us immaterial for the result will be the same. Having perceived a creditor status for the holders of securities supported by Inland stock, we are unable to make any provision for the minor interest of 1.4% of the common stock of Inland directly held by public investors, as recommended by the SEC. The holders of such stock were in no sense creditors."

NO.

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No. 241

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

ALLEN COMMITTEE AND EDWARD D. SPILMAN,
Petitioners,
—*against*—
THE COLUMBIA GAS SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF OF THE COLUMBIA GAS SYSTEM, INC. IN OPPOSITION TO THE PETITION OF ALLEN COMMITTEE AND EDWARD D. SPILMAN FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In re Inland Gas Corp., 187 F. 2d 813 (6th Cir. 1951) 2, 4, 5, 7, 9

In re Inland Gas Corp., 211 F. 2d 381 (6th Cir.), *cert. denied*, 348 U. S. 840 (1954) 2, 3, 5, 7

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DEFINITIONS AND REFERENCES

The Petitioners attempted to make their points in the Court of Appeals below by two procedures—an appeal from the District Court's order and an original "Petition and Motion" to the Court of Appeals (which Petitioners sometimes refer to in their Petition here for a writ of certiorari as "the Petition").

In this Brief in opposition, we will use the following defined terms:

Petition: The instant petition of the Allen Committee and Edward D. Spilman for a writ of certiorari.

Petition Below: The "Petition and Motion of the Allen Committee and Edward D. Spilman for Leave to Propose Provisions in Plan of Reorganization" dated July 2, 1956, in the United States Court of Appeals for the Sixth Circuit.

Appeal Below: The appeal of the Allen Committee and Edward D. Spilman from the order of the District Court entered March 14, 1956 (No. 12865 in the Court of Appeals).

American Fuel, Inland and Kentucky Fuel: Respectively, American Fuel and Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, the debtors in the proceedings under Chapter X of the Bankruptcy Act in the District Court.

Emphasis has been supplied and parallel citations have been omitted in quotations throughout this Brief.

NOTE AS TO THE RECORD

Certain portions of the original record before the District Court were printed for the use of the Court of Appeals in Cases No. 9775-77 (prior appeals in these proceedings reported at 151 F. 2d 461 (1945)). In the appeals below these portions of the record were transmitted and certified by the District Court in the form of these printed volumes in lieu of original record and have also been transmitted and certified to this Court in this form. References thereto are designated: 1945 Rec.

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals abuse its discretion in refusing to reopen and reconsider determinations "previously, and repeatedly, made" in these reorganization proceedings?

COUNTERSTATEMENT OF THE CASE

Though hardly dispassionate, the Petition's "Statement" is (when supplemented as to the two matters discussed below) adequate to enable this Court to determine whether or not to grant a writ of certiorari. However, it contains numerous inaccuracies* and it is far from complete in its statements

first as to how often the Courts below have considered (and decided adversely to Petitioners) the issues which they now seek to raise, and

---

**E.g.,*

(a) The Petition (p. 9) quotes the last sentence of paragraph 13 of the Findings of Fact of the District Court entered in these proceedings on September 3, 1943, which sentence was in fact stricken from the Findings by the District Court (1945 Rec. V. I, p. 603).

(b) The Petition is replete with references to and quotations from the opinion of the Court of Appeals in 1941 (122 F. 2d 223) and relies upon it to establish certain facts. With respect to that 1941 decision to which Respondent was not a party and which was decided on the basis of allegations in pleadings, the Court of Appeals, in a subsequent decision, 151 F. 2d 461, 463 (1945), has stated:

> "... We are not obliged to consider whether, *upon the facts there assumed,* the American Fuel and Power case was rightly decided, or its mandate broader than the issues required. Columbia was not bound by it, the present record is complete, and the principle of 'the law of the case' does not govern our decision. ..."

That the Court of Appeals does not regard its opinion in 122 F. 2d 223 as presently pertinent to this case is further shown by the fact that the second paragraph of the opinion below (Judge Simons) cites all of the prior decisions of the Court of Appeals *beginning* with that in 151 F. 2d 461, and omits reference to the opinion in 122 F. 2d; see Petitioners' Appendix 26, 241 F. 2d at 375.

second as to the fact that the American Fuel stock (which the courts have so often held not entitled to the relief which Petitioners seek) was promoters stock issued to bankers and promoters who did not invest any of their own money in the companies involved.

As to the *first omission:* While the Petition, in summarizing (pp. 10-13) the "Petition Below", indicates that the Court of Appeals in 1945 (151 F. 2d 461) and again in 1951 (187 F. 2d 813) rendered decisions which would give nothing to the stock (*i.e.* determined that Respondent's claims should be subordinated but not rejected), and refers (p. 12) to one of the Court of Appeals 1954 decisions,* the Petition does not make clear that in 1954 the two issues which Petitioners now seek to raise were both considered and decided adversely to them, *once* by the District Court and *twice* by the Court of Appeals. After the Court of Appeals' first 1954 decision adverse to Petitioners' contentions,** Petitioners on remand filed with the District Court their "Joint Petition for Modification of Confirmed Plan of Reorganization" in which they raised essentially the same issues and requested substantially the same relief. After an adverse decision by the District Court (see Order entered October 7, 1954), Petitioners appealed and that appeal was dismissed on motion by the Court of Appeals as "without merit".***

---

*211 F. 2d 381 (1954).

**Technically, Petitioners were not parties to the 1945, the 1951 and the first 1954 appeals to the Court of Appeals. However, (i) the United States and the Securities and Exchange Commission, representing all American Fuel security holders (including Petitioners) participated in the 1945 appeal; (ii) Alvin Radford and Alfred Howell, *representing the American Fuel stock*, participated fully in the 1951 appeals, unsuccessfully urging the rejection of Respondent's claims; and (iii) in the first 1954 appeal, the American Fuel Trustee permitted counsel for Petitioners to utilize a portion of his time for oral argument before the Court of Appeals.

***217 F. 2d 207, 208 (1954).

No petition for writ of certiorari was made with respect to either of these two prior decisions adverse to Petitioners' present contentions.*

As to the *second omission:* with respect to the facts as to the issuance of the American Fuel stock (which the courts have so often held not entitled to the relief which Petitioners seek) the Petition says only (p. 5) that the common stock of Inland "was held by the organizers and underwriters". This is an inadequate statement of the fact that American Fuel stock was issued, without consideration, to the promoters and bankers who were responsible for the heavy overcapitalization, the insolvent condition and the uninterrupted net losses of the American Fuel companies.**

---

*Writs of certiorari were sought (unsuccessfully) by Respondent in 1945 (see 329 U. S. 737 (1946)) and by a creditor of Kentucky Fuel from the decision reported at 211 F. 2d 381 (see 348 U. S. 840 (1954))—but on issues other than those raised by Petitioner.

**The basic facts as to the issuance of the American Fuel stock (which was issued share for share in exchange for Inland and Kentucky Fuel stock and must therefore be traced to the original promotion of those companies; 1945 Rec. V. 1, p. 592) were found by the District Court in 1943.

As to the issue of the Inland stock, the findings were:

> ". . . The entire issue of its common stock consisting of 341,775 shares was acquired by the promoters and underwriters as compensation for services. The underwriters also received for their services from 10 to 12 percent of the proceeds derived from the securities [*i.e.*, the First Mortgage Bonds and Debentures which the underwriters and promoters sold to the public]. The net returns to the corporation were further depleted by other promotional expenses." (1945 Rec. V. 1, p. 591).

As to the Kentucky Fuel stock:

> ". . . The common stock of the company, apportioned among the promoters and underwriters, consisted of 500,000 shares." (1945 Rec. V. 1, p. 591)

ARGUMENT

I. There is No Important Question of Federal Law to be Decided by this Court.

The decision of the Court of Appeals raises no questions as to the power of a bankruptcy court to alter the rights of creditors or to reject claims because of inequitable conduct. In fact, in the opinion of Judge Miller it was specifically stated that:

> "Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U. S. 215, and Pepper v. Litton, 308 U. S. 295, *the Court had authority to disallow the claim of Columbia.* Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. . . ." (Petitioners' Appendix 41, 241 F. 2d at 382)

Nor does the decision of the Court of Appeals raise any question concerning its power to reopen and reconsider its prior mandates in these proceedings. The Court of Appeals in prior appeals herein has consistently held that it has such powers; see, *e.g., In re Inland Gas Corp.*, 187 F. 2d 813, 815-16:

> ". . . Nor are we precluded by our previous mandate . . . from considering whether the plan of reorganization, now for the first time presented, is, in the light of all circumstances brought forth, fair and equitable, since the allowance of claims in bankruptcy remains interlocutory until the estate has been closed, New York N. H. & H. R. Co. v. Reconstruction Finance Corp., 2 Cir., 180 F. 2d 241, 243, and no application of the principle of 'the law of the case' need deter us from so doing, in an exceptional case, which this is, Reynolds Spring Co. v. L. A. Young Industries, 6 Cir., 101 F. 2d 257, 259 however such principle may circumscribe the action of a district court."

Indeed, throughout the many years of these proceedings, the Court of Appeals has several times revised its prior mandates with respect to the status of the claims of Respondent (and of others); see, *e.g.*, 187 F. 2d 813 (1951) and 211 F. 2d 381 (1954).*

II. The Decision Below Presents No Conflict with Prior Decisions of this Court.

Petitioners assert that "the judgment of the Court of Appeals . . . is in conflict with the rationale of *Pepper* v. *Litton*, 308 U. S. 295 . . ." (Petition p. 15).

But, as indicated above, the Court of Appeals *expressly* recognized its power to reject the claims of Respondent, relying upon that very decision. However, after considering rejection, that Court (in the instant appeals and in several prior appeals) held that the decree should be limited in remedy to the subordination of Respondent's claims. Thus, the Court of Appeals expressly followed the principle established in *Pepper* v. *Litton*, *viz.*, that a bankruptcy court, as a court of equity, *may* alter the priorities of creditors because of inequitable conduct and such alteration may take the form of *either* disallowance *or* subordination—as required by the facts of the particular case.** That case did not create an *inflexible rule requiring as a matter of law complete rejection* of claims presented by a creditor found to have engaged in inequitable conduct.

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*Petitioners' Question 2 (Petition, pp. 3, 18-22) involves the somewhat complicated order of priority affirmed by the Court of Appeals in 211 F. 2d 381 (1954). Respondent refers to that opinion for an answer to Petitioners' contention that the order of priority there established raises an important question of Federal law or is in conflict with previous decisions of this Court.

**See, *e.g.*, 308 U. S. at 306, where, in discussing a tainted claim of an officer, director or stockholder, this Court stated:

> ". . . disallowance *or subordination* may be necessitated by certain cardinal principles of equity jurisprudence."

III. The Only Reviewable Question Here Presented is Whether the Court of Appeals Abused its Discretion.

The Petition concedes that:

> "If the court below had held that the changes in circumstances were insufficient to justify reconsideration of earlier decisions, *the only question which could be reviewed would be abuse of discretion.* But the refusal of the court below to consider whether the vast change in circumstances required reconsideration of its earlier decisions calls for the exercise of this court's power of supervision." (p. 22)

But the Court of Appeals did not refuse to consider the changes in circumstances which Petitioners alleged. It received their Petition Below, their Appeal, their briefs in support of both and heard their oral arguments. A reading of the opinion as a whole shows a full awareness of the fact that conditions had changed, that the value of the Inland estate had increased and that the possibility of Federal income tax had a major bearing upon any reorganization. The knowledge of changes appears throughout the opinion; that the opinion did not recite these changes in the particular paragraph dealing with these Petitioners is immaterial.

Even in describing that particular paragraph, it is not correct to say (as the Petition does, p. 4) that Judge Simons' only comment was that sustaining the Petition Below would mean a reopening, and this the court declined to do. The Petition's quotation from Judge Simons' opinion is inadequate. Judge Simons first said that these Petitioners have suggested that there are changed circumstances which warrant reopening; he next pointed out that others said that no changed circumstances were presented which called for a departure from previous determinations; he then declined to reopen determinations "previously, and repeatedly,

made." This is not a refusal to consider the changes. It is a refusal on the basis of the asserted changes to reopen.*

IV. The Court of Appeals Correctly Exercised Its Discretion in Refusing to Reopen Its Prior Decisions.

Despite the brevity of the opinion of the Court of Appeals, it is apparent from its past opinions and from the record in these proceedings that there were ample grounds to support its decision, *e.g.*, (a) the lack of standing of the American Fuel stockholders before a court of equity and (b) the tenuous nature of the so-called "changed circumstances".

LACK OF EQUITABLE STANDING

Petitioners themselves admit (Petition, pp. 4, 11-12, 22), that their Petition Below and Appeal requested that they be accorded another opportunity to litigate the issues which they had many times previously raised. Indeed, the issue of rejection raised by Petitioners' Question 1 had then been litigated four times, *viz.*, 151 F. 2d 461 (1945), 187 F. 2d 813 (1951), 211 F. 2d 381 (1954), and 217 F. 2d 207 (1954), and the issue of the order of

*The opinion of Judge Simons (speaking for the entire Court on this issue) states:

> "Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding.... The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions.... The holders of Kentucky bonds and debentures asks [sic] us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal . . . on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We *decline* to do so. . . ." (Petitioners' Appendix 37-38, 241 F. 2d at 380)

priorities raised by Petitioners' Question 2 (Petition, pp. 3, 18-22) had then been litigated twice (the two 1954 appeals cited, *supra*).* Petitions for writs of certiorari were not filed as to these latter two decisions;** of the four times the other issue had been decided by the Court of Appeals, there had been no petition for writ of certiorari since its 1945 decision (the denial of which is reported at 329 U. S. 737 (1946)).

In considering Petitioners' present extraordinary request, the Court of Appeals had before it the fact that the American Fuel stock was issued, without consideration, to the promoters and bankers who were responsible for the heavy overcapitalization, the insolvent condition and the uninterrupted net losses of the American Fuel companies and who placed the entire financial risk of the enterprise on the public creditors.

The standing of the American Fuel stockholders does not commend itself to a court of equity for an exercise of discretionary relief—especially since such relief requires the upsetting of twelve years of litigation.***

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*In the past, the Securities and Exchange Commission has advised the District Court that the prior decisions of the Court of Appeals precluded consideration of the issues so often raised by Petitioners in the District Court, the Court of Appeals and now sought to be raised in this Court; see Supplemental Report to the Second Advisory Report of the Securities and Exchange Commission (April 7, 1955):

> "... The Court of Appeals considered and refused to follow the rejection theory and instead rested their decision on the subordination approach (187 F. 2d 813)... Therefore, neither of these objections are well taken and since they are *res adjudicata* should be denied." (p. 9; original emphasis)

See also Fourth Supplementary Report to the Second Advisory Report (December 3, 1955) (p. 7) which is to the same effect.

**See footnote *, p. 3, *supra*.

***We have quoted above the findings of the District Court, approved by the Court of Appeals, relating to the issuance of these stocks. There is extensive material in the record dealing with this subject: 1945 Rec. V. 2, pp. 158-59, 166-67, 304, 321-22; *id.*, V. 3, pp. 1073, 1077.

The So-Called "Changed Circumstances"

The Petition (pp. 13-14) relies on allegations of "[s]ubstantial changes in economic conditions" as "changed circumstances" requiring the Court of Appeals to reopen its prior decisions. Essentially, the so-called "changes in economic conditions" relied on by Petitioners are all founded upon an alleged increase in value of the assets of Inland.* The very same allegations (based on substantially the same factors, *e. g.*, the acquisition of additional gas acreage, the improvement in cash position, *etc.*) were presented to the District Court and the Court of Appeals in the second 1954 appeal (referred to *supra*) and, as indicated, the Court of Appeals dismissed the appeal as "without merit."

Subsequent to the dismissal of that appeal, Petitioners were permitted to introduce evidence on their allegation that the value of the Inland properties was $11,200,000** (Petition, p. 13, par. (1)). Other parties introduced evidence supporting a lesser valuation (*i.e.*, $8,000,000)*** which the District Court found (Order, entered December 15, 1955) to be the proper valuation as an upset price for a public auction sale of the debtors' properties.

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*Petitioners imply that the Court of Appeals has refused to consider their allegations of an increased value of the debtors' estates and has refused to consider the possible impact of such an enhancement of value. Clearly, this is not so. The Court of Appeals has, in the past, instructed the District Judge to give heed to such changes:

> "It is clear that . . . the highly successful operations of the Inland trustee . . . will require substantial changes in the provisions of the plan, including a revaluation of Inland assets. . . . The court is to be free to make such changes as are required by this adjudication and to consider any accretion in value of Inland assets by reason of contracts made, or to be made, with consumers of gas . . ." (187 F. 2d at 820).

**See testimony of Petitioners' expert, V. C. Smith, Transcript 10/7/55, pp. 2-23; deposition of V. C. Smith, 10/20/55, pp. 2-106.

***See testimony of R. E. Davis and J. M. Wege, Transcript, 11/19/55, pp. 10-89.

Petitioners made no objection to (or mention of) this finding of the District Court in their Appeal, their Petition Below, or their briefs to the Court of Appeals, nor do they make such objection (or mention) in their Petition to this Court.

Thus, Petitioners' Petition Below and Appeal can hardly be said to have presented the Court of Appeals with "changed circumstances" requiring reconsideration.

CONCLUSION

For the foregoing reasons, the Petition of the Allen Committee and Edward D. Spilman for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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September 9, 1957

SUPREME COURT, U.S.
SEP 23 1957
JOHN T. FEY, Clerk

No. 241

IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

In the Matter of
INLAND GAS CORPORATION,
Debtor,

In the Matter of
KENTUCKY FUEL GAS
CORPORATION,
Debtor,

In the Matter of
AMERICAN FUEL &
POWER COMPANY, et al.,
Debtors.

In Bankruptcy

REPLY OF ALLEN COMMITTEE AND EDWARD D. SPILMAN (AMERICAN FUEL STOCKHOLDERS) TO BRIEF OF COLUMBIA GAS SYSTEM, INC., IN OPPOSITION TO PETITION FOR CERTIORARI and MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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SPILMAN, THOMAS, BATTLE
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Of Counsel

Sept. 19, 1957

NO.

241

Correction in Record

Columbia correctly points out that the Findings of Fact and Conclusions of Law of the District Court filed September 3, 1943 (1945 Rec. V.1, p. 590, et seq.), were subsequently corrected by order which withdrew and struck therefrom the last two sentences of paragraph 13 of the Findings of Fact. This order was overlooked by present counsel who was not connected with the case in 1943. We request that the Allen Appendix in the Certified Record be amended by striking therefrom the last two sentences of said paragraph 13 of the Findings of Fact. (Allen App., p. 10-A)

No. 241

IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

In the Matter of INLAND GAS CORPORATION, *Debtor*, In the Matter of KENTUCKY FUEL GAS CORPORATION, *Debtor*, In the Matter of AMERICAN FUEL & POWER COMPANY, et al., *Debtors.*	In Bankruptcy

REPLY OF ALLEN COMMITTEE AND EDWARD D. SPILMAN (AMERICAN FUEL STOCKHOLDERS) TO BRIEF OF COLUMBIA GAS SYSTEM, INC., IN OPPOSITION TO PETITION FOR CERTIORARI and MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

I. REPLY TO COLUMBIA

A. Prior Decisions

Columbia's argument that the courts below have often decided issues raised in the Petition is not persuasive. It is, of course, true that the lower courts have repeatedly held on the facts then before them that Columbia's claims are subordinated to the claims of

the public creditors of Inland, American, and Kentucky. A careful reading of the earlier decisions, however, shows that the 1957 decision, review of which is sought, is the only one which has squarely considered questions presented in the Petition, i.e., the relative priority of Columbia's claims and the interests of American public stockholders.

The opinions in 1941, 1945 and 1951[1] considered only creditors' rights. The first 1954 decision[2] did consider American stockholders' rights on a petition by the American Trustee urging that after American public creditor claims were discharged from American's assets, the remaining assets should not be used to discharge claims of Kentucky public creditors, but should be applied to stock interest of American Stockholders, *including Columbia* which owns 76% of the American stock. The Court pointed out that the granting of the prayer of the petition would have permitted Columbia to participate in the debtor's assets, which "would be not only an anomaly but would fly in the face of the rationale of all prior adjudications" (211 F. 2d, p. 384) and denied the prayer of the petition.[3] This is certainly not an adjudication that Columbia's creditor rights are superior to the rights of public American stockholders.

The Court of Appeals directly stated in the second 1954 decision[4] that it had never previously passed on stockholders' rights. Its language is:

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[1]Reported respectively at 122 F. 2d 223, 151 F. 2d 461, and 187 F. 2d 813.

[2]*In re Inland Gas Corp.*, 211 F. 2d 381.

[3]American public stockholders were not represented in the District Court and could not appeal. The petition of the American Trustee did not permit classification of the rights of innocent public stockholders as different from the rights of Columbia as a result of which the Court gave little or no consideration to public stockholders' rights.

[4]*In re Inland Gas Corp.*, 217 F. 2d 207.

> "* * * Throughout our many opinions, it has been made clear that the subordination of the Columbia claims was for the benefit of the security-holders of American Fuel and Kentucky Fuel, and that until the debts to both were satisfied, *there was no occasion to consider any stockholder interest in either*[5] * * *." (217 F. 2d, p. 208)

This decision held only that the public stockholders of American were not entitled to an option to purchase stock in a proposed reorganized corporation. It did not hold that Columbia's claims are superior to the stock interest of the American public stockholders.

It is thus clear that the 1957 decision is the first in which the court below squarely passed on the interest of the American public stockholders. In that opinion the Court, perhaps preoccupied with an understandable desire to terminate 26 years of litigation, affirmed in all respects the judgment of the District Court. But even in this decision the Court considered stockholders' rights to be one of the "minor issues" (Opinion, Judge Simons, Petition, p. 31), and brushed it aside with minimum consideration, and without giving any real reason why the same equities which require injured creditors to be preferred over Columbia, do not require injured stockholders to be preferred.

If review is not granted and the decision below reversed, the important question of bankruptcy law raised by Point 1 of the "Questions Presented" in the Petition will remain unanswered by this Court and the way will be clear in the future for an anti-trust violator to force its competitor into bankruptcy and then use the Bankruptcy Court to recover money

[5]Emphasis supplied.

spent to accomplish the illegal act to the exclusion of stockholders of the debtors.

The S.E.C. urges review on this point.

B. Equitable Standing of Petitioners

Columbia suggests that since the stock represented by petitioners was issued as compensation for services,[6] petitioners have no equitable standing in this Court. This is an extraordinary argument. It was not improper in 1928 to issue stock for services, nor is it today.[7] On the other hand, Columbia, which denies petitioners' equitable standing in court, cannot and does not question the repeated holdings below that its claims and stock were acquired in the course of a conspiracy to restrain trade and competition in clear violation of law. The law-breaker's appeal to equity should not be heard.

II. REPLY TO S. E. C.

While S.E.C. supports review on the Columbia issue, it opposes review of the holding of the court below that Kentucky creditors are entitled to receive Inland assets which passed to American by reason of American's stock holdings in Inland. The reason assigned against review is:

> "* * * There has been no attempt to make a record indicating the relative equities as between

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[6]While Columbia states repeatedly in the Brief that the American stock was issued without consideration, the record clearly shows that this stock was acquired by the organizers and underwriters as compensation for services. See record reference at Footnote **, p. 3, Columbia Brief.

[7]It may be that today the issuing of all the stock for services is not in accordance with best corporate practice, but its issue, as Judge Simons wrote in considering certain gas leases made by Kentucky, should "be viewed in the light of the promotional climate of the times." (208 F. 2d, p. 16) No stock was offered to the general investing public. All stock purchasers, including Columbia, were fully informed of the circumstances of its issue.

> the public creditors of Kentucky Fuel and American Fuel's stockholders. * * *" (Note 20, p. 19, S.E.C. Memorandum)

We disagree with S.E.C. that the record does not show the relative equities as between public creditors of American Fuel and the American Fuel stockholders (see Petition, p. 18, et seq.), but if S.E.C. is right, the lack of record is sufficient reason for review of the opinion of the court below. As we pointed out in the Petition, it might be proper for the court below to provide for discharge of claims against Kentucky out of American assets if clear equitable reasons are shown. In the absence of such showing, or if we are right that the record affirmatively shows that Kentucky creditors have no equities against American, this Court should review the lower court's failure to follow the "absolute priority" rule in bankruptcy.

We note that the position of S.E.C. here is contrary to its position on the 1951 Appeal, when it urged that the stock interest of the public stockholders of Inland in Inland assets should be allowed as superior to the claims of the public creditors of American and Kentucky. (See 187 F. 2d, p. 817)

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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Sept. 19, 1957

NOS.

241

325

336

342

Nos. 241, 620, 660, 642

JOHN F. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1967

ELMO E. ALLEN AND GEORGE GREENWALD, ETC., ET AL.,
PETITIONERS
v.
BEN WILLIAMSON, JR., ET AL.

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
PETITIONER
v.
COLUMBIA GAS SYSTEM, INC., ET AL.

COMMITTEE, ETC., PETITIONERS
v.
COLUMBIA GAS SYSTEM, INC., ET AL.

PAUL E. KERR, ETC., PETITIONER
v.
BEN WILLIAMSON, JR., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 241

ELMO E. ALLEN AND GEORGE GREENWALD, ETC., ET AL., PETITIONERS

v.

BEN WILLIAMSON, JR., ET AL.

No. 325

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, PETITIONER

v.

COLUMBIA GAS SYSTEM, INC., ET AL.

No. 336

COMMITTEE, ETC., PETITIONER

v.

COLUMBIA GAS SYSTEM, INC., ET AL.

No. 342

PAUL E. KERN, ETC., PETITIONER

v.

BEN WILLIAMSON, JR., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 241 F. 2d 374 (Pet. No. 342, pp. 23–43). The District Court filed no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1957 (Pet. No. 342, p. 44).

A petition for rehearing was filed on March 5, 1957, and was denied on May 8, 1957 (Pet. No. 342, pp. 45–46). The petitions for writs of certiorari were filed as follows: No. 325, July 30, 1957; No. 336, August 1, 1957; No. 342, August 5, 1957.

Petitioners in No. 241 did not join in the petition for rehearing. The time for these petitioners to file a petition for a writ of certiorari was extended by order of Justice Burton to July 13, 1957. The petition was filed on July 1, 1957.

The jurisdiction of this Court is invoked under 28 U. S. S. 1254 (1).

QUESTIONS PRESENTED[1]

In Nos. 325, 336 and 342

1. Whether a reorganization court can compel subordination of the claims of a controlling corporation, found guilty of inequitable conduct, to post-reorganization interest on (as well as to the principal of) claims of public unsecured creditors.

In No. 241[2]

2. Where inequitable conduct of a controlling corporation resulted in injury to all security holders of an enterprise, including common stockholders, whether

[1] Other questions are raised by the petition in No. 274, to which a separate response is being filed by the Solicitor General.

[2] For the reasons stated *infra*, p. 19, n. 20, the Commission does not support the grant of certiorari as to the other question tendered by the petition for No. 241.

a reorganization court may subordinate the claims and interests of the controlling corporation not only to the claims of creditors but also to the interests of common stockholders to the extent that such subordination may be equitable.

STATEMENT

This case arises out of proceedings under Chapter X of the Bankruptcy Act involving the debtors Inland Gas Corp. ("Inland"), Kentucky Fuel Gas Corp. ("Kentucky Fuel"), and American Fuel and Power Co. ("American Fuel").[3] The Securities and Exchange Commission is a party to the proceedings pursuant to Section 208 of the Bankruptcy Act (11 U. S. C. 608). These proceedings are a continuation of proceedings under former Section 77B of the Bankruptcy Act, which in turn succeeded equity receiverships of the debtors that had been instituted in 1930 and 1931.

It has previously been established that the receivership proceedings had been caused by Columbia Gas and Electric Corp. (since renamed the Columbia Gas System, Inc. and referred to herein as "Columbia"), which had control of these debtors, in order to prevent competition with certain of Columbia's subsidiaries. See *Columbia Gas & Electric Corp.* v. *United States,* 151 F. 2d 461. The opinion of the court below in that case, approving numerous findings

[3] Problems arising in these proceedings were considered by this Court in *Columbia Gas & Electric Corp.* v. *American Fuel and Power Co.*, 322 U. S. 379, and in *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156.

of the District Court, is (unless otherwise indicated) authority for the facts set forth in this memorandum.

Inland and Kentucky Fuel were incorporated in 1927 and 1928, respectively, to produce natural gas and acquire gas properties. They were financed by the public sale of their debt securities. The common stocks of each were issued to the same group of promoters and underwriters. American Fuel was organized in 1928 as a holding company to consolidate operations and management. Its debt securities were also sold to the public and its common stock was exchanged for common stock of Inland and Kentucky Fuel. These companies, together with several small corporations wholly owned by American Fuel, constitute the American Fuel system, which has at all times been operated as an integrated enterprise.

Prior to the organization of this system, Columbia had virtual freedom from competition in the field occupied by its subsidiaries in Kentucky, Ohio, and West Virginia. But thereafter it lost certain of its large industrial customers to the American Fuel system. In January 1930, having noted that Inland and Kentucky Fuel had sustained substantial operating losses and that default upon their bonds might be anticipated, Columbia began to purchase Inland and Kentucky Fuel bonds on the open market, so that it would be in a position to force foreclosure and sale of their properties. These purchases continued until Columbia had acquired in excess of 25% of the bonds of both companies.

Meanwhile, Hope Engineering Co., which had been supervising and managing the operations of Inland

and Kentucky Fuel, determined that the only hope of survival of the American Fuel system was by financing a large expansion of its business. Together with two other companies, it formed a syndicate to construct a natural gas transmission line to the City of Detroit, which was not then served with natural gas, and it agreed to provide funds sufficient to prevent immediate default on the obligations of American Fuel, Inland, and Kentucky Fuel. The syndicate acquired a majority of American Fuel's common stock, giving it control of the system. As the court below previously noted (*Columbia Gas & Electric Corp.* v. *United States,* 151 F. 2d 461, 464): "The Syndicate was considered to be a combination of sufficient financial strength and business experience to foreshadow success of the Detroit project and so prevent the impending financial collapse of the American Fuel System."

Shortly thereafter, Columbia, which had also planned to supply natural gas to the Detroit area, purchased the syndicate's entire holdings in the American Fuel system, giving the syndicate a clear profit of $350,000, as well as agreeing to hold its members harmless by reason of obligations they had undertaken, and otherwise obligating itself to Hope Engineering Company in a manner which it ultimately settled by the payment of $400,000. Upon obtaining control, Columbia brought about receivership proceedings and the American Fuel system's Detroit project was abandoned.

The court below found "that the Detroit line would have served American Fuel and its subsidiaries, and

in its successful completion lay their only hope for escape from impending financial disaster." *Columbia Gas & Electric Corp.* v. *United States, supra,* 151 F. 2d at 468. It added (*id.* at 469): "The prospect of recovery and possible profit in what may now seem to have been initially an improvident investment by security holders, lay in the achievement by American Fuel and its subsidiaries of an expanded market to be opened up by the Detroit pipeline. The realization of their hopes was forever destroyed by the activities of Columbia in assuming control of American Fuel system, terminating further pursuit of the Detroit plan and placing the companies in receivership."

By reason of Columbia's activities, the court determined that its securities must be subordinated to those of other creditors of every class of the American Fuel system (*id.* at 470). The instant petitions raise questions as to the maximum limits of this subordination.[4]

Substantially all the physical assets in the system are those held in Inland.[5] 72.6% of Inland's stock is held by American Fuel and 26% thereof is held by Kentucky Fuel. In recent years, Inland's properties

[4] The court had earlier indicated that Columbia's claims should be rejected. *In re American Fuel and Power Co.*, 122 F. 2d 223. Subsequent to the decision in *Columbia Gas & Electric Corp.* v. *United States*, 151 F. 2d 461, when subordination of Columbia's claims was first directed, the extent of the subordination of Columbia's securities has been involved in *Columbia Gas and Electric Corp.* v. *United States*, 153 F. 2d 101, certiorari denied, 329 U. S. 737; *In the Matter of Inland Gas Corp.*, 187 F. 2d 813; and *In re Inland Gas Corp.*, 211 F. 2d 381, certiorari denied, 348 U. S. 840; *In re Inland Gas Corp.*, 217 F. 2d 207.

[5] *In re Inland Gas Corp.*, 187 F. 2d 813, 819–820 (C. A. 6).

have greatly increased in value. Inland's first mortgage bonds, other than those held by Columbia, have been paid in the amount of approximately $2,650,000 principal and $2,600,000 interest. Also, more recently, the holders other than Columbia of Inland's second mortgage, which secured Inland's debentures and gold notes, have been paid in full by payments of approximately $1,530,000 principal and $2,236,000 interest. In addition, during the course of the proceeding, approximately $870,000 in interest was paid on the publicly held notes of American Fuel and approximately $400,000 was paid on Kentucky Fuel's bonds.

The remaining creditor claims against the debtors, including interest at the contract rate as of December 31, 1955, are as follows: [6]

	Principal	Interest	Total
INLAND			
Advances due American	$335,936	$573,674	$909,610
Claims of general creditors	10,167		10,167
6½% First Mortgage Bonds held by Columbia	1,671,054	2,610,965	4,182,019
7% Second Mortgage Debentures by Columbia	320,000	569,511	889,511
Unsecured claims for advances by Columbia	252,313	413,775	666,088
AMERICAN			
7% Gold Notes held by public	1,905,100	2,533,783	4,438,883
7% Gold Notes held by Columbia	60,000	107,100	167,100
6% Demand Notes held by Columbia	552,000	841,568	1,393,568
Unsecured claims of Columbia	17,000		17,000
KENTUCKY			
6¾% First Mortgage Bonds publicly held	2,236,600	3,316,692	5,553,292
6½% Debentures publicly held	542,000	901,300	1,443,300
6¾% First Mortgage Bonds held by Columbia	1,685,871	2,755,204	4,441,075
6½% Debentures held by Columbia	397,600	661,176	1,058,776
Unsecured claims for advances by Columbia	65,607	107,652	173,259

[6] These figures were obtained for the most part from the reports of February 25, 1956, of Eskew, Gresham & Diersen, certified public accountants of Louisville, Kentucky, filed in the

The determination below arose in connection with a plan proposed by the trustees for the sale of the assets of the system, other than cash, at an upset price of $8,000,000.[7] Under the plan, the public creditors of American Fuel would have been compensated in full and Kentucky Fuel's creditors would have received the balance of the system assets. This distribution would be in accordance with previous rulings of the court below (1) that, after payment of Inland's public creditors, American Fuel's and Kentucky Fuel's public creditors should be paid in proportion to their corporations' stock ownership in Inland,[8] and (2) that, after full payment of American Fuel's public creditors, all the assets of Inland should be applied to the payment of Kentucky Fuel's public creditors until they should be fully paid.[9] The plan was found by the Securities and Exchange Commission to be fair and equitable.

After adverse federal tax rulings indicated that the debtors' estates would be subject to substantial capital gains tax upon the sale of the assets, the Inland-Kentucky Fuel trustee petitioned the District

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proceeding in the District Court. Where not so obtained, the figures as to principal may be found in the Commission's Corporate Reorganization Release No. 90 (1952), and subsequent interest has been computed at the contract rate.

[7] Although an $8,000,000 offer in existence at the time of formulation of the plan was withdrawn during the pendency of the appeals below, the trustees have not abandoned the sale proposal; and the problem involved here—the relative participation of various classes of claimants—will necessarily be involved in connection with any other plan.

[8] *In re Inland Gas Corp*, 187 F. 2d 813.

[9] *In re Inland Gas Corp.*, 211 F. 2d 381.

Court to adjudicate the tax consequences of the sale. The court held that it lacked jurisdiction to make such an adjudication (Pet. No. 342, p. 21).

The court also denied confirmation of the plan. The court's order states that (Pet. No. 342, pp. 21–22) "he was of opinion that the public holders of bonds and debentures of Kentucky Fuel Gas Corporation, being unsecured creditors, are not entitled to post-bankruptcy interest on their claims and that said plan is erroneous in allowing such post-bankruptcy interest, and for that reason, and for the further reason that the Court lacks jurisdiction and hence cannot pass upon the tax question presented by said petition of Ben Williamson, Jr., Trustee as aforesaid, and because of the uncertainty resulting from such undetermined tax question, the Court was of opinion that the plan should not be confirmed. * * * The Court then directed the Trustees herein to prepare and file a new Plan of Reorganization which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation." Informally, the court also expressed the view that, after the payment of the principal of Kentucky Fuel's claims, the balance should go to Columbia. (See Appendix of Ben Williamson, Jr., Trustee, etc., filed June 29, 1956, in the court below "Tr. App.", p. 110.)

The Court of Appeals, one judge dissenting, affirmed the District Court's order. The court below also refused to grant a petition on behalf of American Fuel stockholders (petitioners in No. 241) urging the court to reconsider certain of its earlier determinations and reject Columbia's claims.

DISCUSSION

1. The petitions in Nos. 325, 326, and 342 present an important question in reorganization law which we believe has been improperly decided below.

(*a*) The decree of subordination against Columbia's claims did not by its terms exclude post-reorganization interest on the publicly-held claims of Kentucky Fuel's creditors. Nor was there any determination that the payment of principal was sufficient to compensate the Kentucky Fuel creditors for the harm inflicted upon them by Columbia's inequitable conduct. In 1945, when the court below decreed subordination, it stated that "[i]t was neither for the [District Court], nor is it for us to indulge in retrospective prophecy" and that subordination was required because "a restoration of the status quo ante is manifestly now impossible."[10]

The majority of the court below now holds that, since the Kentucky Fuel creditors' paramount claims against the Inland assets are unsecured, post-reorganization interest cannot be allowed *vis-a-vis* the subordinated claims of Columbia solely because of the so-called "bankruptcy rule" which, in its view, it is required to apply here under this Court's decisions in

[10] *Columbia Gas & Electric Co.* v. *United States*, 151 F. 2d 461, 469, 470 (C. A. 6). As noted in note 4, *supra*, the court below had originally felt that rejection was proper. See *In re American Fuel and Power Co.*, 122 F. 2d 223. Instead, it ordered subordination (which at that time appeared to achieve the same result) largely in deference to this Court's decision in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, although it has since indicated that the analogy to that case "is not as close as it then appeared to us to be." *In re Inland Gas Corp.*, 187 F. 2d 813, 815 (C. A. 6).

New York v. *Saper*, 336 U. S. 328, and *United States* v. *Edens*, 342 U. S. 912. In those cases, this Court held that federal and local taxes, although entitled to a priority over other unsecured claims under Section 64a (4) of the Bankruptcy Act (11 U. S. C. 104 (a) (4)), bore interest only to the date the bankruptcy petition was filed, not until payment. Hence the majority of the court below has determined that, even though the Kentucky Fuel creditors were deprived of their interest by reason of Columbia's wrongful acts, the remedy of subordination is not broad enough to permit them to receive that interest prior to payment to Columbia on its claims.

This determination conflicts in principle with decisions of this Court which have emphasized that the remedy of subordination is not to be so restricted that it cannot bring about an equitable result. In *Sampsell* v. *Imperial Paper and Color Corp.*, 313 U. S. 215, 219, this Court stated: "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete." See also *American United Mutual Life Insurance Co.* v. *City of Avon Park*, 311 U. S. 138, 146. In *Pepper* v. *Litton*, 308 U. S. 295, 305, it was made clear that the remedy of subordination, like other equitable remedies, is "invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done". Subordination is used to undo so far as possible the wrong committed when a controlling person uses "his power for his personal advantage

and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements." *Id.* at 311. And see *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307.

Any limitation upon the "complete" power of a reorganization court to subordinate claims is of great importance in reorganization and bankruptcy proceedings, since problems whether and to what extent the securities of controlling persons should be subordinated arise with considerable frequency. They are bound to recur whenever a parent owns securities in its subsidiaries of a superior or equal rank to those held by the public.[11]

(*b*) The decision of the court below on the question of post-reorganization interest is in conflict with the decision of the Tenth Circuit in *In re Deep Rock Oil Corp.*, 113 F. 2d 266, certiorari denied, 311 U. S. 699, a reorganization case which arose under former Section 77B of the Bankruptcy Act. There, on prior review in *Taylor* v. *Standard Gas and Electric Co.*, 306 U. S. 307, by reason of the wrongful management and exploitation of the debtor by the parent (Stand-

[11] See, *e. g.*, cases cited at 3 Collier on *Bankruptcy* (14th ed.) ¶ 57.14, notes 6–7; ¶ 65.06, notes 1–2; and at 6 Collier on *Bankruptcy*, ¶ 9.15, note 16; and 1956 Cumulative Supplements thereto. The extent of the application of this remedy is by no means fully reflected in the reported cases, since, in various Chapter X cases where there is no court opinion, approved plans reflect a determination or compromise of contentions that a parent's claim must be subordinated. Problems of subordination have also arisen frequently in reorganizations under Section 11 of the Public Utility Holding Company Act of 1935.

ard), this Court had reversed a lower court judgment approving a compromise plan under which public security holders were not participating in full prior to participation by Standard on an open account. On remand, Standard contended that, even as a subordinated creditor, it should participate in Deep Rock's assets since there was an equity for it of over $2,000,000 if the paramount positions of the public noteholders and preferred stockholders should be limited respectively to the principal amount of the debt and the liquidating value of the preferred stock. In holding that Standard's claims were subordinated also to the interest and dividend arrearages, the Court of Appeals made clear that the noteholders were to be paid interest *to the time of payment.* It said (113 F. 2d at 269): "Where in the administration of the affairs of an insolvent corporation there are claims of different rank, the holders of prior claims are entitled to interest to the time of payment, even though the payment thereof may deprive the holders of subsequent claims of any participation in the funds of the bankrupt." [12]

Judge Miller, speaking for the majority below on this question, recognized that the *Deep Rock* case "lends some support" to the contention of the Ken-

[12] The debtor's assets were valued at about $17,000,000. The claim of the noteholders amounted to $10,000,000 in principal and $4,200,000 in unpaid interest, less an interim distribution of $1,200,000 as interest, or a net aggregate claim for $13,000,000. The liquidation preference of the stockholders amounted to $5,000,000 par value plus $3,150,000 in accumulated dividend arrearages, or an aggregate amount of $8,150,000. *In re Deep Rock Oil Corp.*, *supra*, 113 F. 2d at 267.

tucky Fuel creditors but stated that "such a contention appears to me to be expressly rejected" by this Court in *New York* v. *Saper*, 336 U. S. 328.

(*c*) The *Saper* case, however, is inapplicable here. *Saper* dealt only with tax claims, and the limitation upon the priority of these claims to principal under Section 64 (a) (4) of the Bankruptcy Act as against the claims of general creditors was expressly based upon an overriding Congressional mandate.[13] Neither the *Saper* case, nor related decisions,[14] purported to lay down a rule of distribution in respect

[13] In reviewing the legislative history as to the status of tax claims, this Court referred to the frequent expressions of "dissatisfaction over the inroads taxes and interest thereon make in the fund available for creditors" 336 U. S. at 329, note 5.

[14] Most of the cases cited by the majority below are, like *Saper*, tax cases. *United States* v. *Edens*, 189 F. 2d 876 (C. A. 4), affirmed, 342 U. S. 912; *United States* v. *General Engineering & Mfg. Co.*, 188 F. 2d 80 (C. A. 8), affirmed, 342 U. S. 912; *Pavone Textile Corp.* v. *Bloom*, 302 N. Y. 206, 97 N. E. 2d 755, affirmed *sub nom. United States* v. *Bloom*, 342 U. S. 912; *Commonwealth* v. *Thompson*, 190 F. 2d 10 (C. A. 1), certiorari denied, 342 U. S. 918; *Sword Line, Inc.* v. *Industrial Commissioner of the State of New York*, 212 F. 2d 865 (C. A. 2), certiorari denied, 348 U. S. 830; *National Foundry Company of New York* v. *Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2).

In *United States* v. *Paddock*, 187 F. 2d 271 (C. A. 5), also cited in Judge Miller's opinion, it would appear that the disallowance of post-bankruptcy interest was based on equitable considerations. The case held that the Government was entitled to a priority against funds derived by the bankrupt from certain accounts receivable under an agreement with the bankrupt. The court noted that the agreement with the bankrupt did not expressly provide for interest; that the Government's claim was not "like a claim based on a promissory note that provides for interest"; and that the funds "did not draw interest or produce income in the hands of the trustee" (187 F. 2d at 276).

of post-bankruptcy interest which was to apply to all classes of unsecured creditors of different rank. The implication that the rule in the *Saper* case was to govern in the context of equitable subordination, and to supersede the equities which led to subordination, is even more remote.

Creditor claims do not lose "their interest-bearing quality" when bankruptcy or reorganization proceedings are instituted. See *American Iron and Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266. Interest continues to accrue in the course of the proceedings and is allowed where no inequity results and certainly where equity so requires. For example, secured creditors are entitled to post-bankruptcy interest if the mortgaged assets or collateral security are

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Neither *New York Trust Co.* v. *Detroit, T. & I. Ry. Co.*, 251 Fed. 514 (C. A. 6); *Squire* v. *American Express Co.*, 131 Ohio St. 239, 2 N. E. 2d 766; nor *Jamison* v. *Federal Deposit Insurance Corp.*, 149 F. 2d 199 (C. A. 5), which were also relied on by the majority below, involved questions of subordination by reason of inequitable conduct. The *New York Trust Co.* case held that in a receivership the priority of six-months claimants is limited to principal. The *Squire* case held that the priority of a depositor's preferred claim against an insolvent bank as against general creditors of the bank is limited to principal. In the *Jamison* case, subordination was provided for by the terms of the loan. Hence, when the assets were insufficient to pay all unsecured creditors in full, the contractual priority was limited to principal since "the delay in distribution is an act of the law * * * for which delay no interest by way of damages accrues" (149 F. 2d at 200).

In the remaining case relied upon by the majority below, *Application of Progress Shoe Co.*, 107 F. Supp. 114, 116 (E. D. N. Y.), the court held that the claims involved were on a parity and stated that "no showing has been made of any equitable considerations by which one creditor should be subordinated in payment to the other."

sufficient for that purpose.[15] This right is also accorded to secured creditors as against junior lienholders on the same mortgaged assets, even though as a consequence the junior lienholders may receive only a fraction of their principal.[16] Where the debtor becomes solvent, the surplus must be applied to interest accrued after the filing of the petition;[17] and a plan of reorganization cannot be fair and equitable if it provides for participation by stockholders and denies the bondholders accrued interest against the free assets of the debtor.[18]

These cases, though sometimes classified as exceptions to the bankruptcy rule, are really an affirmation that post-bankruptcy interest should be allowed

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[15] *In re Macomb Trailer Coach Co.*, 200 F. 2d 611 (C. A. 6), certiorari denied *sub nom. McInnis* v. *Weeks*, 345 U. S. 958. See also *Coder* v. *Arts*, 213 U. S. 223, 228–229, 245; *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 412–413. Cases such as *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 318 U. S. 523, 572–573, where secured creditors did not receive full interest while unsecured creditors participated, involve situations where the mortgaged assets have been insufficient to cover the full claim and, as to the unmortgaged assets, secured creditors stand on equal footing with the general creditors. On the portion of their claim in excess of the mortgaged assets the courts have held that they share ratably with general creditors in the unmortgaged assets on the basis of principal only. See also *Sexton* v. *Dreyfus*, 219 U. S. 339.

[16] See *R. F. C.* v. *Denver & Rio Grande Western Railroad Co.*, 328 U. S. 495, 502–503 n. 6, 517. See also *American Iron and Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 267; *Central Trust Co.* v. *Condon*, 67 Fed. 84, 98 (C. A. 6).

[17] *Johnson* v. *Norris*, 190 Fed. 459, 463 (C. A. 5), appeal dismissed for lack of jurisdiction, 232 U. S. 715.

[18] *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 514–516, 520–521, 527.

to prior claimants where it is consonant with, or required by, the rule of absolute priority and the fair and equitable standard. As this Court said in *Vanston Bondholders Protective Committee* v. *Green,* 329 U. S. 156, 165, which arose in this very reorganization: "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor." Accordingly, the issue in the instant case, as Chief Judge Simon stated, must be resolved "by balancing the equities as between Columbia and the Kentucky Fuel creditors who have waited so long for the payment of their claims." We submit that he properly concluded that earlier decisions as to the extent and character of Columbia's unconscionable conduct have long since resolved the equities in favor of the Kentucky Fuel creditors.

(*d*) The judgment below, insofar as it sustains the District Court's rejection of the plan's provision for post-reorganization interest and the District Court's direction to the trustees to propose a plan without such a provision, is undoubtedly "non-final" in the sense that the decision contemplates a remand for purposes of formulation of a new plan. Nevertheless, we believe that review by this Court would be appropriate at the present time. The Court has jurisdiction, 28 U. S. C. 1254 (1); and its decisions have emphasized that such jurisdiction will be exercised despite the interlocutory character of the judgment

where the judgment presents an important issue which is "fundamental to the further conduct of the case." See *United States* v. *General Motors Corp.*, 323 U. S. 373, 377; *Land* v. *Dollar*, 330 U. S. 731, 734, n. 2; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3. Particularly is this so if there is a conflict between circuits on the issue presented. *United States* v. *General Motors Corp., supra*, at 374. This is precisely such a case.

If we are correct in urging that the Kentucky Fuel creditors are entitled to post-reorganization interest, to require the formulation of a plan denying such interest is to require further needless litigation based on a plan which is defective at the outset. Thus, the interest question, already shown to be an important one generally in reorganization law (*supra*, pp. 11–12), is "fundamental to the further conduct of the case." And, as noted, the Sixth and Tenth Circuits are in conflict on the issue. Its definitive determination at this time would help immeasurably in bringing to a close what has been the longest reorganization to date under Chapter X.

2. (*a*) For the reasons stated, the Commission believes that Columbia's claims should be subordinated to the claims of the Kentucky Fuel creditors for post-reorganization interest as well as principal. In addition, in the event that the estate should prove large enough to yield a surplus after payment in full of the claims of the Kentucky Fuel creditors for post-reorganization interest as well as principal, the Commission believes that Columbia's claims should be further

subordinated to the claims of the stockholders.[19] To this extent we are in accord with the general position of the petitioners in No. 241, a committee of stockholders of American Fuel.[20]

As we have noted (*supra*, p. 8), when it appeared that there were sufficient assets fully to compensate the creditors of American Fuel, the court below held that all the remaining assets might be applied toward

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[19] In *In re Inland Gas Corp.*, 187 F. 2d 813, 817, the court below, recognizing the inequity of any participation by Columbia in Inland's assets prior to payment of the public creditors of American Fuel and Kentucky Fuel, which together own 98.6% of Inland's stock, held that, after the payment of Inland's direct creditors other than Columbia, creditors of American Fuel and Kentucky Fuel, as "creditors or quasi-creditors of Inland," might participate in Inland's assets before Columbia. Accordingly, Inland's assets were to be siphoned up to these creditors of the holding companies in accordance with their respective stock interests in Inland. But the court refused to permit a similar participation to the 1.4% of the common stock of Inland not held by the holding companies on the ground that the holders thereof "were in no sense creditors." At that time, however, the value of Inland's assets was insufficient to compensate fully the creditors of ~~either~~ American Fuel ~~or~~ Kentucky Fuel. Thus, there was no disposition as to the relative rights of Columbia and the 1.4% group.

[20] The petition in No. 241 also seeks to have this Court review the reaffirmance by the court below of its 1953 determination permitting the creditors of Kentucky Fuel to be compensated from the assets of Inland applicable to American's stockholdings therein after the claims of American's creditors have been satisfied. See note 4, *supra*. There has been no attempt to make a record indicating the rel[illegible] equities as between the public creditors of Kentucky Fuel and American Fuel's stockholders. Nor is the factual context giving rise to the question as to the relative priorities of these security holders likely to recur in any subsequent reorganization. For these reasons, among others, the Commission does not believe that the question is an appropriate one for review by this Court.

the claims of Kentucky Fuel's public creditors. *In re Inland Gas Corp.*, 211 F. 2d 381. As a result of a continuing increase in Inland's assets, it now appears that the claims of Kentucky Fuel's public creditors, including post-reorganization interest, might be satisfied in full; and there will be a substantial surplus if post-reorganization interest is denied. The District Court has informally indicated that Columbia should take any surplus remaining (Tr. App. 110). In the Commission's view, such a disposition would be erroneous.

Columbia's improper activities in preventing the opening of the Detroit market for the gas produced by the system companies put an end to their hope of profits and hence were held to have adversely affected all security holders of the system.[21] Accordingly, equitable treatment requires that all receive compensation, including the common stockholders who have no "creditor status," [22] prior to any distribution to Columbia. No creditor status is necessary for application of the doctrine of subordination. See *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, where subordination to preferred stock was required.

We recognize, of course, that subordination to common stock presents a novel problem and that the applicable judicial precedents deal with subordination to debt or preferred stock. That security holders injured by improper activities of one in control are the owners of common stock, which has an unlimited claim to assets, rather than the holders of securities

[21] *In re Inland Gas Corp.*, 187 F. 2d 813, 817; *In re Inland Gas Corp.*, 211 F. 2d 381, 384.

[22] Cf. *In re Inland Gas Corp.*, 187 F. 2d at 817.

with a limited claim, however, presents no justification for permitting a guilty controlling person to participate in the assets of a debtor prior to those it has injured. In appropriate circumstances, some limit to the extent of the subordination could be found. For example, if the maximum damage were computable, that could be the measure,[23] or it is possible that there might be situations where the original offering price to the public or the highest market price might be deemed proper. Where the opportunity for profit which was ended by the parent's improper activities appears to have been unlimited, subordination might properly be treated as the equivalent of disallowance. This Court has noted that both subordination and disallowance are equitable remedies to undo the wrong where control has been exercised "for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment to the *cestuis.*" *Pepper* v. *Litton*, 308 U. S. 295, 311.

The problem of subordination to common stock, it should be recognized, could arise in any reorganization where a controlling person has acted unconscionably to the injury of other common stockholders, as it has arisen in the past under the Public Utility Holding Company Act of 1935.[24] In addition, depending on the amount of future increments to the Inland estate, the problem may well have a substantial impact in this very proceeding.

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[23] Cf. *In re Kansas City Journal-Post Co.*, 144 F. 2d 791, 800 (C. A. 8).

[24] See *The North American Company*, 33 S. E. C. 632, where this problem was the subject of a compromise.

(*b*) There is some doubt, however, whether the question of subordinating Columbia's claims to stockholder claims is properly presented here.

The petition in No. 241 (p. 4) "seeks review of the judgment of the Court of Appeals dismissing a petition in that court by these petitioners to permit them to propose provisions of a plan of reorganization of the debtors which will require modification of earlier judgments of the Court of Appeals." The proposed provisions would (i) reject or subordinate the claims of Columbia to the claims and stock interests of all other security holders of the debtors, and (ii) apply the assets of each of the debtors first to paying its own creditors and thereafter to its own stockholders before paying the creditors of the other debtors.[25] In denying the petition—in essence a motion for rehearing—the court below referred only to the latter proposed provision (Pet. No. 342, p. 34). As a consequence, there is no basis for assuming that the court below passed on any question relating to the relative priorities of Columbia and the stockholders. Ordinarily, where an out-of-time petition for rehearing is denied by a lower tribunal without an express disposition of the question raised, it is presumed that there was no adjudication of the question. See *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149–150; *Bowman* v. *Loperena*, 311 U. S. 262, 266. And cf. *Securities and Exchange Commission* v. *Louisiana Public Service Commission*, 353 U. S. 368.

But, regardless of whether the question of the relative priorities of Columbia *vis-a-vis* the stockholders

[25] See note 20, *supra*.

is properly before the Court on the independent basis advanced by the petitioners in No. 241, there would seem to be no barrier to this Court's consideration of the matter in the event that it grants certiorari in Nos. 325, 336, and 342 to review the question concerning post-reorganization interest for the Kentucky Fuel creditors. Indeed, since the extent of Columbia's subordination is common to both questions, the adjudication of the issue relating to the Kentucky Fuel creditors will necessarily touch on the issue relating to the stockholders. In these circumstances, it would appear appropriate to grant review in No. 241 as well as in Nos. 325, 336, and 342.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions in Nos. 325, 336, and 342 should be granted, and, in such event, that the petition in No. 241 should be granted limited to the question whether there should be subordination of Columbia's claims to the interests of common stockholders of American Fuel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957.

No. 214

In the Matter of:
INLAND GAS CORPORATION, Debtor.

In the Matter of:
KENTUCKY FUEL GAS CORPORATION, Debtor.

In the Matter of:
AMERICAN FUEL & POWER CO., Et Al., Debtor.

} In Bankruptcy.

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Et Al., - - - - - - - - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Dated: July 1, 1957.

... FIELD-REED CO. INCORPORATED, LOUISVILLE, KY.

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Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended—
Sec. 64 (a) (4), 11 U. S. C. §104 (a) (4)..... 12
Sec. 221 (4), 11 U. S. C. §621 (4)..... 12
Federal Declaratory Judgments Act, c. 512, 48 Stat. 955, as amended, 28 U. S. C. §2201.....2, 3, 8, 10, 11, 12, 13, 14
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Miscellaneous:

Borchard, Declaratory Judgments, 2d ed., p. 144.. 11
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IN THE

Supreme Court of the United States

October Term, 1957.

No._____

In the Matter of:
INLAND GAS CORPORATION, Debtor.

In the Matter of:
KENTUCKY FUEL GAS CORPORATION, Debtor.

In the Matter of:
AMERICAN FUEL & POWER CO., Et Al., Debtor.

} In Bankruptcy.

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Et Al., - - - - - - - - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on February 14, 1957.

NO.

.274

Citations to Opinion Below.

The District Court did not render a written opinion, but its findings are contained in an order printed in Appendix B, *infra,* pp. 16-18. The opinion of the Court of Appeals, printed in Appendix B, *infra,* pp. 19-38, is reported in 241 F. 2d 374.

Jurisdiction.

The judgment of the Court of Appeals was entered February 14, 1957, Appendix B, *infra,* p. 39. An order was entered in this Court April 26, 1957, extending the time for filing a petition for a writ of certiorari to and including July 13, 1957. The jurisdiction of this Court is invoked under 28 USC §1254(a) and 11 USC §47(c).

Question Presented.

Whether a District Court, sitting in a reorganization proceeding under Chapter X of the Bankruptcy Act, has jurisdiction, notwithstanding the provisions of the Federal Declaratory Judgments Act, c. 512, 48 Stat. 955, as amended (28 USC §2201), to determine, upon a petition for advice and instructions of the trustee of the debtors, the federal income tax consequences to the debtors of a proposed sale of assets under a plan of reorganization.

Statute Involved.

The statute involved is the Federal Declaratory Judgments Act, c. 512, 48 Stat. 955, as amended (28 USC §2201). It is printed in Appendix A, *infra*, p. 15.

Statement.

Inland Gas Corporation (Inland) and Kentucky Fuel Gas Corporation (Kentucky) were incorporated in 1927 and 1928, respectively, for the purpose of engaging in the business of producing, transporting, and selling natural gas to industrial consumers (Allen App. 52a, 57a).* American Fuel & Power Company (American) was incorporated in 1928 for the primary purpose of acquiring the stock of Inland and Kentucky (Allen App. 60a). American owns 72.6% of the stock of Inland and 91.12% of the stock of Kentucky (Allen App. 62a). Shortly after their incorporation, Inland, Kentucky, and American each had substantial issues of debt securities. Default was made on these securities in 1930, and these proceedings followed, first as equity receiverships, afterwards as proceedings under §77B of the Bankruptcy Act, and finally as a consolidated corporate reorganization proceeding under Chapter X of the Bankruptcy Act in the District Court for the Eastern District of Kentucky (Allen App. 52a, 57a, 60a). The basis of juris-

*Petitioner has not filed a transcript of the record in this cause, but, in lieu thereof, has filed a certified copy of the appendices filed by all parties below, as permitted by paragraph 3 of Rule 21 of the Rules of this Court. Accordingly, all citations to the record of this cause are to the various appendices filed below, which are identified by the party filing the same.

diction of the District Court in the first instance is founded upon 28 USC §1334.

The past history of the debtors is fully disclosed in the opinions of the Court of Appeals for the Sixth Circuit in *Columbia Gas & Electric Corporation* v. *United States* (CA 6th, Ky.), 151 F. 2d 461, *modification denied* (CA 6th, Ky.), 153 F. 2d 101, *certiorari denied,* 329 U. S. 737, 91 L. Ed. 636, 67 S. Ct. 48; *In re Inland Gas Corporation* (CA 6th, Ky.), 187 F. 2d 813; *In re Inland Gas Corporation* (CA 6th, Ky.), 208 F. 2d 13; *In re Inland Gas Corporation* (CA 6th, Ky.), 211 F. 2d 381, *certiorari denied, Kern* v. *Williamson,* 348 U. S. 840, 99 L. Ed. 662, 75 S. Ct. 45; *In re Inland Gas Corporation* (CA 6th, Ky.), 217 F. 2d 207, and in the opinion of this Court in *Vanston Bondholders Protective Committee* v. *Green,* 329 U. S. 156, 91 L. Ed. 162, 67 S. Ct. 237. It will suffice to note here that, after more than twenty-six years of operation of the debtors' properties by receivers and trustees, the affairs of the debtors have not yet been settled. While numerous plans of reorganization have been filed and the legal issues arising from the claims of creditors have been submitted on six different occasions to the Court of Appeals and on one occasion to this Court, no plan of reorganization has been approved by the parties or confirmed by the District Court.

Although the objective of reorganization has not been accomplished and remains elusive, the financial condition of the debtors has vastly improved, with the result that the creditors of Inland, except Columbia Gas System, Inc. (Columbia), whose claims have been

subordinated to the claims of all other creditors of every class (*In re Inland Gas Corporation,* (CA 6th, Ky.), 187 F. 2d 813; *In re Inland Gas Corporation* (CA 6th, Ky.), 211 F. 2d 381, *certiorari denied Kern* v. *Williamson,* 348 U. S. 840, 99 L. Ed. 662, 75 S. Ct. 45) have been paid in full, and the so-called surplus assets of Inland, together with assets in the hands of the Trustee of American, are of sufficient value to discharge in full the claims of the creditors of American, except Columbia, and to provide for a substantial payment on the claims of the creditors of Kentucky, except Columbia (Allen App. 76a-81a).

The most recent plan of reorganization, entitled "Amended Plan of Reorganization dated February 12, 1953, as Further Amended September 23, 1955, and as Finally Amended" (the Plan), provides for the sale of the fixed assets and materials and supplies of Inland and three of the subsidiaries of American at public auction to the highest bidder at a fair upset price of $8,000,000.00, the upset price being the amount of an offer for such assets obtained from Tennessee Gas Transmission Company. The Plan further provides for distribution to the creditors of the proceeds to be realized from the sale, together with all remaining assets of the debtors, and for dissolution of the debtors within a period of twelve months following the adoption of the Plan (Allen App. 51a-81a).

The District Court found the Plan to be fair and equitable and feasible in accordance with the provisions of Chapter X of the Bankruptcy Act, and the same was submitted to the creditors, "affected by the

plan'' for their approval or rejection (Trustee's App. 57, 58).

Prior to the filing of the Plan, the District Court had under consideration a similar plan of reorganization (hereinafter called the Texas Plan) based upon an offer of $6,750,000.00 for the same assets (Trustee's App. 16, 17). Said upset price was substantially in excess of the adjusted basis for federal income tax purposes of the assets to be sold (Allen App. 67a, 68a), and your petitioner, as Trustee of Inland and Kentucky, was thus confronted with the question of whether or not the gain realized on the sale of such assets would be subject to federal income tax.

Consequently, on March 16, 1955, your petitioner applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale under the Texas Plan would result in any federal income tax liability to Inland or its Trustee (Trustee's App. 75, 76). It was and is the position of your petitioner that the sale of the assets of Inland to be made as provided in the Texas Plan, as well as in the Plan, would quite obviously fall within the purview of §337 of the Internal Revenue Code of 1954, 26 USC §337, with the result that no gain would be recognized for purposes of federal income taxes. Nevertheless, on July 1, 1955, the Commissioner issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain for the purposes of federal income taxes (Trustee's App. 76). Subsequently, on August 9, 1955, petitioner applied to the Commissioner of Internal Revenue for a reconsideration of such

ruling. On December 29, 1955, the Commissioner affirmed his original ruling (Trustee's App. 76). In the view of your petitioner, the ruling of the Commissioner and his subsequent reaffirmance of such ruling were clearly erroneous and arbitrary. The ruling itself not only constituted notice that the Commissioner would assert a tax against Inland of not less than $1,192,000.00 (Allen App. 80a) if the Plan was confirmed and effected, but was a sufficient threat to ensure the defeat of the confirmation of any plan involving the sale of the assets of the debtors.

The Plan failed to receive the necessary affirmative votes from the affected creditors (Trustee's App. 72, 73). The principal objection to the Plan voiced by the dominant creditor of Kentucky, who subsequently voted against its adoption and defeated its acceptance, was that the tax consequences of the Plan, based on the Commissioner's ruling, would be unfavorable to the creditors (Trustee's App. 60-65). Your petitioner, believing that the best interests of all of the creditors of the debtors would nevertheless be served by a sale of the debtors' fixed assets at public auction, as provided in the Plan, and believing that the tax question should be resolved prior to such sale, filed in the District Court his petition for advice and instructions, asking for an adjudication of the tax question (Trustee's App. 74-81). The Commissioner of Internal Revenue and other officials appeared specially and moved to dismiss the petition for want of jurisdiction. Said petition was heard on March 8,

1956, and the District Court sustained said motion and dismissed the petition, assigning the following ground:

> "* * * said petition is in effect an application for a declaratory judgment and under the provisions of the Federal Declaratory Judgments Act this Court is without jurisdiction to entertain the petition. * * *" (Appendix B, *infra*, p. 17).

On the same day the District Court refused to confirm the Plan, partially "* * * because of the uncertainty resulting from such undetermined tax question * * *" (Appendix B, *infra*, p. 17).

Petitioner appealed from the order of the District Court dismissing his petition for advice and instructions seeking an adjudication of the tax question (Trustee's App. 103). The United States Court of Appeals for the Sixth Circuit affirmed the order of the District Court dismissing said petition (Appendix B, *infra*, p. 30). In the view of two of the three judges who sat in the cause, the phrase "except with respect to Federal taxes," as contained in the Federal Declaratory Judgments Act, not only prohibited application for relief under the Federal Declaratory Judgments Act in matters involving federal taxes, but withdrew from United States courts jurisdiction to adjudicate tax matters before the occurrence of the taxable event, even though the source of jurisdiction was not dependent upon the Declaratory Judgments Act. The third judge held, without more, that the parenthetical phrase "except with respect to Federal taxes" prohibited the District Court from considering your petitioner's petition for advice and instructions.

Reasons for Granting the Writ.

1. Clearly the question presented is of the utmost importance in the administration of the federal bankruptcy and tax laws. Every bankruptcy reorganization is affected, if not controlled, by the federal income tax consequences of the exchange or liquidation features of the plan of reorganization. Indeed, in many cases the tax consequences of the exchange or liquidation are determinative of whether the plan of reorganization meets the requirements of Chapter X of the Bankruptcy Act as to fairness, equity, and feasibility.

Since judicial determination as to fairness, equity, and feasibility and judicial confirmation of the plan precede implementation of the plan, and thus the taxable event of the exchange or liquidation, certainty as to federal tax consequences is crucial.

Unfortunately, the informed judgment of the parties and their counsel as to the tax consequences of an exchange or liquidation comprehended by a plan of reorganization is at best an educated guess. The form and structure of our federal tax laws are complicated, and the statutory language is often imprecise and obscure. Words and phrases of the Internal Revenue Code are given diverse meanings in diverse contexts, and the revealed or concealed intention of Congress is subject to various interpretations. In many cases there are few, if any, definitive judicial determination to serve as precedents, and in the case at bar the controlling revenue statute, §337, IRC 1954, 26 USC

§337, is of such recent origin that it has not received the attention of the courts. It is therefore imperative that, unless the parties to a bankruptcy reorganization are to proceed at their own peril, judicial determination of tax consequences to the debtor must be had before, and not after, the exchange or liquidation.

Traditionally, courts of equity and bankruptcy courts have assumed jurisdiction over petitions for advice and instruction filed by a trustee. This jurisdiction has been utilized by bankruptcy courts to determine anticipatory matters, including questions involving federal income taxes.

Settlement by this Court of the question of whether or not the limitation contained in the Federal Declaratory Judgments Act prevents a bankruptcy court from adjudicating tax matters prior to the taxable event in discharge of its traditional and historical duty to advise and instruct trustees in bankruptcy proceedings is plainly, in the interest of the public. This question is an important question of federal law which has not been, but should be, put at rest by this Court.

2. The decision of the Court of Appeals is believed to be erroneous. The source of the jurisdiction of the District Court to entertain petitioner's petition for advice and instructions was not founded upon the Federal Declaratory Judgments Act, but upon the well established jurisdiction of a court sitting in equity or in bankruptcy to entertain a petition for advice and instructions filed by a trustee. See *Mosser* v. *Darrow*, 341 U. S. 267, 274, 95 L. Ed. 927, 933, 71 S. Ct. 680, wherein Mr. Justice Jackson stated:

> "The practice is well established by which trustees seek instructions from the court, given upon notice to creditors and interested parties, as to matters which involve difficult questions of judgment. * * *"

See also *Continental Illinois National Bank & Trust Co.* v. *Chicago R. I. & P. Ry. Co.*, 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595; *Burco, Inc.* v. *Whitworth* (CA 4th, Md.), 81 F. 2d 721; *Collector* v. *Western Pacific R. R. Co.* (CA 9th, Cal.), 246 F. 545; *In re Town Crier Bottling Co.* (DC Mo.), 123 F. Supp. 588. In the past it has been held that a petition for instructions is appropriate in cases where federal taxes are involved. *Collector* v. *Western Pacific R. R. Co., supra.* See also, *In re Town Crier Bottling Co., supra.*

Long before the enactment of the Federal Declaratory Judgments Act on June 14, 1934, courts of bankruptcy and other courts of equity gave instructions to trustees on various matters, including matters dependent upon future contingencies. As stated by Professor Borchard, an eminent authority in the field of declaratory judgments, the declaratory action itself is an outgrowth and extension of the trustee's bill in equity for instructions. See *Borchard, Declaratory Judgments,* 2d Ed., p. 144.

The Federal Declaratory Judgments Act was enacted to create a new form of action. This is clear from the title of the Act—"Creation of remedy"—and is also borne out by the Senate Report accompanying

the Federal Declaratory Judgments Act, which report states, insofar as pertinent—

> "The proposed Section 274 D would *simply extend declaratory relief to other cases* provided the parties and the subject matter are within the jurisdiction of the federal courts. * * * In principle, therefore, there is nothing novel about the procedure." *Senate Report No.* 1005, 73d *Cong.*, 2d *Sess.*, p. 2. (Emphasis supplied.)

The absence of a Federal Declaratory Judgments Act did not deter federal courts from rendering decisions on petitions for instructions involving matters dependent upon prospective events. See *Collector* v. *Western Pacific R. R. Co., supra; Burco, Inc.* v. *Whitworth, supra; In re Town Crier Bottling Co., supra.*

The jurisdiction of a bankruptcy court to entertain the petition of a trustee seeking advice and instructions on federal tax questions is obviously consistent with the provisions of the Bankruptcy Act, as Congress, by virtue of §221(4) of the Bankruptcy Act, 11 USC, §621(4), and §64(a)(4) of the Bankruptcy Act, 11 USC §104(a)(4), granted to a bankruptcy court specific authority to determine the validity of post-bankruptcy taxes, and this jurisdiction has been held to be exclusive. *Cohen* v. *United States* (CA 1st), 115 F. 2d 505. See also §6871 IRC 1954, 26 USC §6871, and Treasury Regulations, IRC 1954, §39.274-1.

The Court of Appeals, although not questioning the apparent jurisdiction of a bankruptcy court to decide questions dependent upon future events, took the position that Congress, in amending the Federal

Declaratory Judgments Act by the insertion of the parenthetical phrase "except with respect to federal taxes," intended to prevent the federal courts from considering any federal tax question prior to the taxable event, even though the jurisdiction to obtain such relief was not founded upon the Federal Declaratory Judgments Act.

The parenthetical phrase "except with respect to federal taxes" was grafted onto the statute by way of an amendment to the Declaratory Judgments Act. Act of August 30, 1955, c. 829, 49 Stat. 1027, §405. The legislative history of the amendment clearly and unequivocally dispels the idea that the limitation with respect to federal taxes contained in the Federal Declaratory Judgments Act applies to other forms of relief. The Senate Report accompanying the Revenue Bill of 1935 states, with respect to the amendment:

> "Your committee has added an amendment making it clear that *the Federal Declaratory Judgments Act* of June 14, 1934, *has no application to Federal taxes.*" S. Rep. 1240, 74th Cong., 1st Sess., p. 11. (Emphasis supplied.)

The report of the Conference Committee accompanying the Revenue Bill of 1935 states, in connection with the amendment:

> "The amendment also adds a section making it clear that *the Federal Declaratory Judgments Act* of June 14, 1934, *has no application to federal taxes.*" H. Rep. 1885, 74th Cong., 1st Sess., p. 13. (Emphasis supplied.)

It is abundantly clear that the application of the phrase "except with respect to Federal taxes" is limited to the scope of the Federal Declaratory Judgments Act, and that in holding otherwise the decision of the Court of Appeals was clearly erroneous.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

SELDEN S. MCNEER,
ROBERT K EMERSON,
Counsel for Petitioner,

CAMPBELL, MCNEER & WOODS,
Of Counsel.

July 1, 1957.

APPENDIX A.

Federal Declaratory Judgments Act (28 USC §2201).

"§2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

APPENDIX B.

Order of H. Church Ford, U. S. D. C. J., dated March 14, 1956, From Which Appeal Was Taken to United States Court of Appeals for the Sixth Circuit.

This cause came on for hearing on March 8, 1956, at Lexington, in said district, pursuant to notice duly given as provided by law.

Thereupon the Court proceeded to consider the petition of Clinton M. Harbison, Trustee of American Fuel & Power Company, praying that the Court confirm the "Amended Plan of Reorganization dated February 12, 1953, as further amended September 23, 1955, and as finally amended", under the provisions of Sections 179 and 216(7) of the Bankruptcy Act, regardless of the fact that two-thirds in amount of the public holders of Kentucky Fuel Gas Corporation bonds have not accepted said plan. And the Court heard testimony offered in support of the confirmation of said plan and also heard argument of counsel in favor of the confirmation of said plan, by counsel for said Clinton M. Harbison, Trustee as aforesaid, and by counsel for Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, and by counsel for various interested creditors herein, and also heard argument of counsel for Paul E. Kern and counsel for certain American Fuel & Power Company stockholders in opposition to the confirmation of said plan. The Court also heard a statement by counsel for the Securities Exchange Commission to the effect that further consideration of the confirmation of said plan should await a determination of the federal income tax question raised by petition filed herein by Ben Williamson, Jr., Trustee as aforesaid, and hereinafter mentioned.

Without making any decision upon said petition of Clinton M. Harbison, Trustee as aforesaid, the Court called up for consideration the petition filed herein by said Ben Williamson, Jr., Trustee as aforesaid, for an adjudication that no federal income tax liability will be incurred by the estates of the Debtors by reason of the sale of certain assets as provided in said Plan, and for injunctive relief. Thereupon came Henry J. Cook, United States Attorney, and C. S. Titus, special counsel, and appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for the District of Kentucky, and filed a motion to dismiss said petition of Ben Williamson, Jr., Trustee, for want of jurisdiction. After hearing argument of counsel on said motion, the Court was of opinion that said petition is in effect an application for a declaratory judgment and under the provisions of the Federal Declaratory Judgment Act this Court is without jurisdiction to entertain the petition. Whereupon it is ORDERED that said motion be and the same is hereby sustained and said petition of Ben Williamson, Jr., Trustee as aforesaid, is hereby dismissed.

The Court then proceeded to consider further the above mentioned petition of Clinton M. Harbison, Trustee as aforesaid, to confirm said plan. And thereupon the Court announced from the bench that he was of opinion that the public holders of bonds and debentures of Kentucky Fuel Gas Corporation, being unsecured creditors, are not entitled to post-bankruptcy interest on their claims and that said plan is erroneous in allowing such post-bankruptcy interest, and for that reason, and for the further reason that the Court lacks jurisdiction and hence cannot pass upon the tax question presented by said petition of Ben Williamson, Jr., Trustee as aforesaid, and because of the uncertainty resulting from such undetermined tax question, the Court was of opinion that the plan should not be confirmed. Whereupon it is ORDERED that said petition of Clinton M. Harbison, Trustee as aforesaid, be and

the same is hereby dismissed and confirmation of said plan is denied

The Court then proceeded to consider the proposed plan of reorganization offered by Paul E. Kern, and dated July 7, 1955, and the Court was of opinion that said Kern plan is not worthy of consideration for the reason that it proposes to encumber the reorganized corporation with a heavy indebtedness, and for other reasons stated from the bench. Whereupon it is ORDERED that said Kern Plan be and it is hereby adjudged not worthy of consideration within the meaning of Chapter X of the Bankruptcy Act.

The Court then directed the Trustees herein to prepare and file a new Plan of Reorganization which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation.

Robert S. Spilman, Jr., counsel for certain stockholders of American Fuel & Power Company then moved the Court to require Ben Williamson, Jr., Trustee as aforesaid, to mail to him certain statements with respect to the business and operations of Inland Gas Corporation. Whereupon it is ORDERED that said Trustee shall forthwith furnish to said counsel copies of monthly reports gotten out by said Trustee for the year 1955, and hereafter furnish to said counsel copies of all reports with respect to Inland Gas Corporation and its business and operations which are furnished by said Trustee to other counsel of record in this proceeding.

March 14, 1956

Enter:

(s) H. Church Ford
Judge

Opinion of United States Court of Appeals for the Sixth Circuit, dated February 14, 1957.

In re INLAND GAS CORPORATION, Debtor.

In re KENTUCKY FUEL GAS CORPORATION, Debtor.

In re AMERICAN FUEL & POWER COMPANY et al., Debtor.

Nos. 12861-12867.

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge.

After more than twenty six years of Receiver and Trustee operation of the Debtors' properties, of litigation delaying reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas & Electric Corporation v. United States, 6 Cir., 151 F.2d 461, modification denied, 6 Cir., 153 F.2d 101, certiorari denied 329 U.S. 737, 67 S.Ct. 48, 91 L.Ed. 636; In re Inland Gas Corporation, 6 Cir., 187 F.2d 813; In re Inland Gas Corporation, 6 Cir., 208 F.2d 13; In re Inland Gas Corporation, 6 Cir., 211 F.2d 381, certiorari denied Kern v. Williamson, 348 U.S. 840, 75 S.Ct. 45, 99 L.Ed. 662; In re Inland Gas

Corporation, 6 Cir., 217 F.2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan entitled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Court circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modifications. The important new developments consisted of a substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so, the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 337, and that no gain or loss should under its provisions be recognized.

A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offered $8,000,000.00 in cash for the same properties which it confirmed by a deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganziation, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation for the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purposes of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decision is correct, the Federal tax involved would be approximately $1,192,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these rulings and as an assumed result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began

buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202, it was without jursidiction to entertain it. Whereupon, it ordered that the petition of the Trustee be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors, were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and can-

not pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganized corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as evidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recog-

nized to such corporation from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unnecessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed," so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in a Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for a successful and prompt reorganization by the $8,000,000.00 offer received by Tennessec. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses

effectiveness by the withdrawal of the Tennessee offer and the release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the petitions, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U. S.C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C.F.R. § 1.337-2(b). The problem with which § 337 was concerned arose out of the decisions in Commissioner v. Court Holding Co., 324 U.S. 331, 65 S.Ct. 707, 89 L.Ed. 981, and United States v. Cumberland Public Service Co., 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251, and the Section was enacted to avoid nice distinctions between whether proprety was sold by a corporation or in reality by its share-

holders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re American Fuel & Power Co., 6 Cir., 151 F.2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F.2d 813, 819, we said: "The order will be amended by direction to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered to those rulings. 217 F.2d 207. Fol-

lowing them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) if the alleged bankrupt proves solvent, post-bankruptcy interest is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bankruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period a difference of opinion

as to allowance of interest on tax claims. They were considered in some jurisdictions as claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the light of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr. Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S.Ct. 237, 241, 91 L.Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F.2d 266, certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, and its predecessor, Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 618, 59 S.Ct. 543, 83 L.Ed. 669, that, as said in Sampsell, 313 U.S. at page 219, 61 S.Ct. at page 907, "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further observation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F.2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation, for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan of reorganization, which may or may not contain a provision for sale of the properties, or which may or may not submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems here involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted, we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debenture asks

us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12865, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, Circuit Judge.

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 163, 67 S.Ct. 237, 91 L.Ed. 162; Sexton v. Dreyfus, 219 U.S. 339, 344, 31 S.Ct. 256, 55 L.Ed. 244; City of New York v. Saper, 336 U.S. 328, 330-331, 69 S.Ct. 554, 93 L.Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U.S. 261, 267, 34 S.Ct. 502, 58 L.Ed. 949; City of New York v. Saper, supra, 336 U.S. 328, at page 330, 69 S.Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle of the debt secured, the excess should be applied to post-bankruptcy interest on the obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F.2d 611, 613, certiorari denied McInnis v. Weeks, 345 U.S. 958, 73 S.Ct. 940, 97 L.Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 and Pepper v. Litton, 308 U.S. 295, 60 S. Ct. 238, 84 L.Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp., 5 Cir., 149 F. 2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscion-

able conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On the contrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York v. Saper, supra, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U.S.C.A. The Court said 336 U.S. at page 337, 69 S.Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64, sub. a, and 57, sub. n [11 U.S.C.A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X, United States v. Edens, 4 Cir., 189 F.2d 876, affirmed 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F.2d 80, affirmed 342 U.S. 912, 72 S.Ct. 358, 96 L.Ed. 682; Pavone Textile Corp. v. Bloom, 302 N.Y. 206, 97 N.E.2d 755, affirmed sub nom., United States v. Bloom, 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F.2d 10, certiorari denied 342 U.S. 918, 72 S.Ct. 364, 96 L.Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F.2d 865, certiorari denied 348 U.S. 830, 75 S.Ct. 53, 99 L.Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F.2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp., supra, 5 Cir., 149 F.2d 199; United States v. Paddock, 5 Cir., 187 F.2d 271, 276; Application of Progress Shoe Co., D.C.E.D.N.Y., 107 F.Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N.E.2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U.S. 156, 67 S.Ct. 237, 240, 91 L.Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U.S. at page 166, 67 S.Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F.2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, Circuit Judge.

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in

certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28, U.S.C. provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States • • • upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the Declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies; and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from

the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court sitting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers . are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule." The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. • • •"

Study of the history of the Act reveals that the words "except with respect to Federal taxes" upon which this issue turns were not a part of the original statute, but were inserted by amendment in 1935. 49 Stat. 1027.

Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori,* an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he, as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U.S.C., as follows: "§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee of the debtor corporations is on the same footing with any other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solvent* corporation engaged in a reorganization may have an equally large amount of tax liability, contingent upon the outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *insolvent* corporation should be in a preferred position. The possible loss of a favorable business transaction is insufficient reason of itself to create the extraordinary circumstances necessary for the injunctive relief sought by appellant. The Internal Revenue Code of 1954, section 7421, states the general rule: "(a) Tax. * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This restraint against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases

where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509, 52 S.Ct. 260, 263, 76 L.Ed. 422.

This court has held that any exception to the universality of the application of section 7421 of the Internal Revenue Code must turn upon "present extraordinary and entirely exceptional circumstances." John M. Hirst & Co. v. Gentsch, 6 Cir., 1943, 133 F.2d 247, 248. We stated there that the "circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued." In my judgment, departure from the clear statutory prohibition is not warranted in the present circumstances.

Inasmuch as the United States District Court had no jurisdiction over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commissioner as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reasons stated by him, that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax liability for lack of jurisdiction should, in my judgment, be affirmed.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit
No. 12,861

Ben Williamson, Jr., Trustee of Inland Gas Corporation, and
Kentucky Fuel Gas Corporation, - - Appellants,

v.

Securities and Exchange Commission, - Appellee.

ORDER.

Before SIMONS, Chief Judge, MARTIN and MILLER, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) Charles C. Simons
Chief Judge

Filed
February 14, 1957
Carl W. Reuss, Clerk

A True Copy
Attest:
Carl W. Reuss, Clerk
By Grace Keller
Deputy Clerk

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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1957

BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION AND KENTUCKY FUEL GAS CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR THE COMMISSIONER OF INTERNAL REVENUE

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 274

BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION AND KENTUCKY FUEL GAS CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR THE COMMISSIONER OF INTERNAL REVENUE

OPINIONS BELOW

The District Court did not file an opinion. The opinion of the Court of Appeals and the separate opinions of Judges Miller and Martin, all concurring in affirming the District Court's order on the issue presented in the petition (Pet. 19–38), are reported at 241 F. 2d 374.

JURISDICTION

The order of the Court of Appeals was entered February 14, 1957. (Pet. 39.) An order of Mr. Justice Burton entered on April 26, 1957, extended the time for filing a petition for a writ of certiorari to

and including July 13, 1957. The petition for a writ of certiorari was filed on July 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254, and Section 24 of the Bankruptcy Act, as amended, 11 U. S. C., Section 47.

QUESTION PRESENTED[1]

Whether a District Court, sitting in reorganization proceedings under Chapter X of the Bankruptcy Act, as amended, can render a declaratory judgment as to the tax effect of a proposed sale of debtor's assets if consummated under a proposed plan of reorganization.

STATUTE INVOLVED

28 U. S. C., c. 151, Declaratory Judgments:

> SEC. 2201. *Creation of remedy.*
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> * * * * *

STATEMENT

The facts material to the issue presented here are not in dispute. Inland Gas Corporation (Inland)

[1] Other questions involving the decision below are presented by the petitions in Nos. 241, 325, 336, and 342, to which a separate response has been filed in a Memorandum for the Securities and Exchange Commission.

and Kentucky Fuel Gas Corporation (Kentucky) were incorporated in 1927 and 1928, respectively. American Fuel & Power Company (American) was incorporated in 1928 for the primary purpose of acquiring the stock of these two corporations. American owns 72.6% of the stock of Inland and 91.12% of the stock of Kentucky. Inland, Kentucky, and American each had substantial issues of debt securities upon which they defaulted in 1930, and these proceedings followed, first as equity receiverships, afterward as proceedings under Section 77B of the Bankruptcy Act, and finally as a consolidated corporate reorganization proceeding under Chapter X of the Bankruptcy Act. (Pet. 3.)

After many years of receiver and trustee operation of the debtor's properties, consideration of plans for reorganization, and prolific litigation,[2] the District Court directed the trustees to make appropriate provision for public auction of the fixed assets of Inland and three subsidiaries of American with an offer to pay $6,750,000 therefor by the Texas Gas Transmission Corporation (Texas) to constitute a fair upset

[2] The past history of the debtor corporations is disclosed in the opinions of the Court of Appeals for the Sixth Circuit in *In re American Fuel & Power Co.*, 122 F. 2d 223; *Columbia Gas & Electric Corp.* v. *United States*, 151 F. 2d 461, modification denied, 153 F. 2d 101, certiorari denied, 329 U. S. 737; *In re American Fuel & Power Co.*, 151 F. 2d 470; *In re Inland Gas Corp.*, 187 F. 2d 813; *In re Inland Gas Corp.*, 208 F. 2d 13; *In re Inland Gas Corp.*, 211 F. 2d 381, certiorari denied *sub nom. Kern* v. *Williamson*, 348 U. S. 840; *In re Inland Gas Corp.*, 217 F. 2d 207. See, also, *Vanston Committee* v. *Green*, 329 U. S. 156, affirming *In re American Fuel & Power Co.*, 151 F. 2d 470 (C. A. 6th); and *Columbia Gas Co.* v. *American Fuel Co.*, 322 U. S. 379.

price. As the upset price was in excess of the adjusted basis for federal income tax purposes of the assets which were to be sold, the trustee of Inland applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any federal income tax liability to Inland or its trustee. The trustee's position was that the Texas plan would fall within the reach of Section 337 of the Internal Revenue Code of 1954 and that no gain or loss should be recognized under its provisions. (Pet. 20.) The Commissioner issued an advisory ruling that the proposed sale would result in the recognition of gain for federal tax purposes. (Pet. 21.)

A bid was thereafter received from Tennessee Gas Transmission Company (Tennessee) offering to pay $8,000,000 in cash for the same properties. With its offer, Tennessee made a deposit of $400,000 in evidence of good faith. A new plan of reorganization was prepared which provided for the sale of the fixed assets of Inland and the subsidiaries of American at public auction to the highest bidder [3] with the Tennessee offer as a fair upset price. After the substitution of the Tennessee offer, the trustees applied to the Commissioner for a reconsideration of his ruling under the Texas plan. The Commissioner reaffirmed his former ruling.

Thereupon, the trustee of Inland and Kentucky

[3] The properties of Kentucky had already been sold. See *In re American Fuel & Power Co.*, 122 F. 2d 223, 227 (C. A. 6th).

filed a petition in the District Court praying, *inter alia* (R. 80):[4]

> that no gain or loss for purposes of federal income tax shall be recognized to Inland and to the three subsidiaries of American in connection with the sale of their respective fixed assets at public auction under the provisions of the Plan; * * *.

The District Court denied this petition, having concluded that it was without jurisdiction to entertain the petition which it considered to be in effect an application under the provisions of the Declaratory Judgment Act. (Pet. 17.) On this issue, the Court of Appeals unanimously affirmed. (Pet. 39.)

While the appeal was pending, Tennessee's offer was withdrawn (pursuant to a reservation contained in the offer) and the deposit was released. (Pet. 23.)

ARGUMENT

1. The decision below is correct. Section 2201 of the Judicial Code (*supra*, p. 2), the so-called Declaratory Judgment Act, specifically excepts from its provisions questions "with respect to Federal taxes." In this case, the trustees (R. 80) sought a determination "that no gain or loss for purposes of federal income tax shall be recognized" to the debtor corporations in connection with the proposed sale of their fixed assets and

[4] Petitioner has not filed a transcript of the record herein, but in lieu thereof has filed certified copies of the appendices filed by all parties in the Court of Appeals. (Pet. 3, fn.) Record references herein are to the Appendix to the trustees' brief in the court below.

a proposed complete liquidation to debtor's creditors. They sought that determination on the basis of their contention that Section 337 of the Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. II, Sec. 337) would be applicable to such a sale and distribution. The Commissioner had rejected this contention in an informal ruling.[5]

Even on the assumption that there is involved here an "actual controversy" within the meaning of the Declaratory Judgment Act and for purposes of Article III of the Constitution (see *infra*, pp. 9–10), it is clear that the controversy, as evidenced by the petition in the District Court, is "with respect to Federal taxes."[6] It is also clear, as the courts below held, that the petition is in substance a request for a declaratory judgment. The requested judgment therefore falls squarely within the express interdiction of the Declaratory Judgment Act.

There is no merit to petitioner's contention that the exception in the Act "with respect to Federal taxes" is not applicable in a bankruptcy proceeding. He

---

[5] Such rulings by the Commissioner are merely advisory. *Couzens* v. *Commissioner*, 11 B. T. A. 1040, 1052–1053, 1148–1150; *Avco Manufacturing Corp.* v. *Commissioner*, 25 T. C. 975, 983, 986.

[6] *Red Star Yeast & Products Co.* v. *La Budde*, 83 F. 2d 394, 396 (C. A. 7th); *Beeland Wholesale Co.* v. *Davis*, 88 F. 2d 447 (C. A. 5th), certiorari denied, 300 U. S. 680; *Murphy* v. *Graves*, 120 F. 2d 243 (C. A. 6th), certiorari denied *sub nom. Murphy* v. *Brady*, 314 U. S. 661; *Tomlinson* v. *Smith*, 128 F. 2d 808 (C. A. 7th); *Wilson* v. *Wilson*, 141 F. 2d 599 (C. A. 4th); *Royce* v. *Squire*, 168 F. 2d 250 (C. A. 9th); *Noland* v. *Westover*, 172 F. 2d 614 (C. A. 9th), certiorari denied, 337 U. S. 938; *Taylor* v. *Allan*, 204 F. 2d 485 (C. A. 10th).

cites no case so holding.[7] To the contrary, as Judge Martin so aptly pointed out below (Pet. 35), the *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not Congress has *withdrawn* from the courts of the United States the jurisdiction to adjudicate tax matters by the declaratory judgment procedure. That it has done so is clearly indicated by the history of the Declaratory Judgment Act. As originally enacted, it did not contain the exception "with respect to Federal taxes." This exception was added as an amendment by Section 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1014, 1027. The committee reports[8] state that the amendment was added to make it clear that the Act had no application to federal taxes; that the application of the Act to taxes would constitute a radical departure from a long-continued policy of Congress as

[7] Three of the five cases cited by petitioner (Pet. 10–11) did not involve taxes. *Mosser* v. *Darrow*, 341 U. S. 267; *Continental Illinois National Bank* v. *Chicago R. I. & P. Ry. Co.*, 294 U. S. 648; *Burco, Inc.* v. *Whitworth*, 81 F. 2d 721 (C. A. 4th). Of the remaining two cases, one was decided in 1917 long prior to enactment of the Declaratory Judgment Act. *Scott* v. *Western Pac. R. Co.*, 246 Fed. 545 (C. A. 9th) (cited in the petition as *Collector* v. *Western Pacific R. R. Co.*). The fifth case—a district court decision—involved the question of whether the trustee, as an officer of the court, should file certain returns. *In re Town Crier Bottling Co.*, 123 F. Supp. 588 (E. D. Mo.). Moreover, the last two cases concerned *past* financial transactions—not (as here) hypothetical transactions which might occur in the future. See *infra*, pp. 8–10.

[8] S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 651, 657). See, also, H. Conference Rep. No. 1885, 74th Cong., 1st Sess., p. 13 (1939–1 Cum. Bull. (Part 2) 660, 666).

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expressed in Rev. Stat. 3224 [9] and other provisions with respect to the determination, assessment, and collection of federal taxes; and that existing procedures afforded ample remedy for the correction of tax errors.[10]

2. In any event, there is not involved here an "actual controversy" within the meaning of the Declaratory Judgment Act and for purposes of Article III of the Constitution. Stated otherwise, even apart from the Act's exception "with respect to Federal taxes," the District Court was without jurisdiction to adjudicate the tax consequences of the proposed sale.

The controlling principles were well stated by Mr. Chief Justice Hughes for a unanimous Court in *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240–241:

> The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.
>
> A "controversy" in this sense must be one that is appropriate for judicial determination.

---

[9] This statute prohibited suits to restrain the assessment or collection of any federal tax. The prohibition has been carried forward into Section 7421, Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. II, Sec. 7421). In this connection, it should be noted that, while the question has not been raised in the petition here, the trustee in his petition in the District Court also prayed that the officers and agents of the United States be enjoined from asserting or collecting any tax with respect to the proposed sale. (R. 80–81.) The courts below held that there were no exceptional and extraordinary circumstances which would permit an exception to the application of Section 7421. (Pet. 25, 31, 37–38.)

[10] See note 11, *infra*.

> * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. [Citations omitted.]

See also, *e. g., Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264; *Muskrat* v. *United States*, 219 U. S. 346.

In the instant case, the trustees were not seeking an adjudication of tax liability with respect to past transactions.[11] On the contrary, they were seeking merely "an opinion advising what the law would be upon a hypothetical state of facts"—namely, what the tax consequences would be *if* the proposed plan (with its provision for sale of the assets) were approved and *if* the proposed vendee (Tennessee) ad-

[11] Sections 64 (a) (4) and 102 of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended (11 U. S. C. 1952 ed., Secs. 104 (a) (4) and 502), together give the bankruptcy court jurisdiction to determine the amount and legality of any tax assessed against a bankrupt, whether assessed before or after bankruptcy (see *Cohen* v. *United States*, 115 F. 2d 505 (C. A. 1)); and any taxes assessed must be collected by claims filed in the bankruptcy court. See Section 6871 of the Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. II, Sec. 6871). In such circumstances, there is no reason why the court should exercise declaratory jurisdiction even had it not been excepted by the Declaratory Judgments Act. See *Great Lakes Co.* v. *Huffman*, 319 U. S. 293.

hered to its offer. As it developed, the plan was rejected by the District Court and Tennessee's offer was withdrawn (pursuant to a reservation contained in the offer.) Moreover, the trustees themselves would have presumably urged rejection of the plan if the tendered tax question had been decided adversely to them. In these circumstances, the trustees' petition plainly did not present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character * * *."

CONCLUSION

The decision below is correct; there is no conflict; and no other reason appears which would warrant review. Accordingly, it is respectfully submitted that the petition for certiorari should be denied.

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AUGUST 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 325

In the Matter of:
INLAND GAS CORPORATION, *Debtor.*

In the Matter of:
KENTUCKY FUEL GAS CORPORATION, *Debtor.*

In the Matter of:
AMERICAN FUEL & POWER CO., et al., *Debtors.*

In Bankruptcy

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitio

vs.

COLUMBIA GAS SYSTEM, INC., BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and BEN WILLIAMSON, JR., as Trustee of KENTUCKY FUEL GAS CORPORATION, et al.,
Respona

PETITION OF VANSTON COMMITTEE REPRESENTIN FIRST MORTGAGE BONDS OF KENTUCKY FUEL GA CORPORATION FOR WRIT OF CERTIORARI TO UNITE STATES COURT OF APPEALS FOR THE SIXTH CIRCU

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Dated: July 29, 1957

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Record References

Petitioner has not filed a transcript of the record in this cause, but, in lieu thereof, a certified copy of the appendices filed by all parties below, has been filed as permitted by paragraph 3 of Rule 21 of the Rules of this Court. Accordingly, all citations to the record of this cause are to the various appendices filed below or herewith, which are identified by the party filing the same.

App.—Appendix to this petition.

Tr. App.—Appendix of Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation—the second appendix in the Certified Record.

Allen App.—Appendix of Allen Committee and Edward D. Spilman, Representing Stockholders of American Fuel & Power Company—the fourth appendix in the Certified Record.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

In the Matter of:
INLAND GAS CORPORATION, *Debtor.*

In the Matter of:
KENTUCKY FUEL GAS CORPORATION, *Debtor.*

In the Matter of:
AMERICAN FUEL & POWER CO., et al., *Debtors.*

} In Bankruptcy

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

vs.

COLUMBIA GAS SYSTEM, INC., BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and BEN WILLIAMSON, JR., as Trustee of KENTUCKY FUEL GAS CORPORATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioner, the Vanston Protective Committee, representing holders of First Mortgage Bonds of

Kentucky Fuel Gas Corporation respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Sixth Circuit to review the order and judgment of that Court rendered in the above cause, affirming an order of the District Court of the United States for the Eastern District of Kentucky.

The Opinions of the Court Below

The District Court did not write an opinion but entered an order which is included in the record and is appended hereto (App., p. 1a). The opinions of the Court of Appeals for the Sixth Circuit, one judge dissenting, are reported at 241 F. 2d 374 and are appended hereto (App., pp. 5a, 19a and 23a).

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 11 U.S.C. Section 47(c). The date of the judgment of the Court of Appeals is February 14, 1957, and it was entered on that day (App., p. 29a). The date of the order of that Court denying rehearing of the matter is May 8, 1957 and it was entered on that day (App., p. 30a).

Question Presented for Review

Whether the Court of Appeals erred in refusing to allow interest on the publicly held bonds and debentures of Kentucky Fuel Gas Corporation for the period subsequent to the date of bankruptcy.

Statutes Involved

The Sherman Act Sections 1 and 2, 26 Stat. 209 as amended 50 Stat. 693 (15 U.S.C. §§ 1 and 2).

The following sections of the Bankruptcy Act: Section 57n (11 U.S.C. § 93n), Section 63 (11 U.S.C. § 103), Section 64 (11 U.S.C. § 104), Section 102 (11 U.S.C. § 502), Section 106 (11 U.S.C. § 506), Section 200 (11 U.S.C. § 600), Section 216 (11 U.S.C. § 616).

Statement

The question presented relates to the validity of a provision of a reorganization plan, in a proceeding under Chapter X of the Bankruptcy Act, providing for the payment of post-bankruptcy interest on the publicly held funded debt of Kentucky Fuel Gas Corporation. The Court below disallowed such interest.

This corporation and Inland Gas Corporation as well as American Fuel & Power Co., their controlling stockholder, were in 1930 producers of natural gas in Kentucky. A large part of their securities, including a majority of the outstanding shares of American, were owned by a syndicate consisting of Hope Engineering Company and others. This syndicate during 1930 had acquired options on part of a right of way for a pipe line whereby gas produced by these companies would have access to Detroit and it had also procured contracts for the sale of approximately 19,000,000 cubic feet of gas per day in the Detroit area. At that time the Columbia Gas and Electric Corporation, now the Columbia Gas System, was engaged in the business of producing, transporting and distributing natural gas in Indiana, Ohio, Kentucky, Pennsylvania and New York and controlled through its subsidiaries one-fourth of the total mileage of the natural gas pipe lines operating within the United States. Columbia learned of the efforts of the three companies

to obtain the Detroit business. It made a detailed investigation of the financial condition and the gas reserves of the American Fuel & Power Co. and its subsidiaries, which showed an unfavorable financial status. Shortly thereafter one of Columbia's vice-presidents stated that the contemplated construction of additional gas pipe lines by American and its subsidiaries in Ohio constituted an improper invasion of Columbia's territory, and when the three corporations commenced their expansion into the state of Ohio, the same vice-president stated that his company would not stand idly by and permit the construction of competing natural gas pipe lines across that state. In January, 1930, Columbia began to purchase in the open market bonds of the Kentucky Fuel and Inland Gas corporations, and by May 30th of that year had acquired over 27% of the bonds of each company. By the end of October or early November, 1930, Columbia had acquired all the interest of the syndicate in the American company and its subsidiaries for $2,870,700, which price exceeded the syndicate's original investment by $350,000. Columbia also agreed to hold harmless the syndicate from any claim American or its subsidiaries might have against the syndicate for breach of its agreement to provide funds to enable the Inland and Kentucky Fuel companies to make certain sinking fund payments. The Hope Company had a contract with American and its subsidiaries to supervise the construction of their pipe lines to Detroit at an estimated cost of $20,000,000, for which services it was to receive 4% of the cost. Shortly after Columbia bought out the syndicate it made an agreement with Hope for the supervision of $20,000,000 of other construction work for which Hope was to

receive a fee of 4% of the cost. Later, Columbia paid Hope $453,000 for cancellation of this contract.

After Columbia had acquired the interest of the syndicate, it made additional purchases increasing its total investment in American Fuel and its subsidiaries to over $6,300,000. When Columbia acquired these securities the three companies had the prospects that would arise from the completion of the gas lines to Detroit.

At about the same time Columbia took steps to reach the Detroit market by extending its own lines.

Columbia after its purchases removed the directors and officers of the American Fuel & Power Co. and its subsidiaries and replaced them with its own nominees, with the exception of the individual who was president of both the Inland and Kentucky Fuel companies who was continued in office. Sinking fund payments on the bonds and debentures of the respective companies were discontinued.

Within thirty days after Columbia obtained control of American and its subsidiaries, it caused Williams and Gibson, a partnership drilling gas wells for Inland, to institute creditors' suits in the United States District Court for the appointment of equity receivers for the Inland and Kentucky Fuel companies. On December 1, 1930, the directors of these corporations passed resolutions consenting to the appointment of receivers and on December 2, 1930, when Williams and Gibson filed their suits, the corporations entered their appearance in the actions and consented to the appointment as receiver of W. E. Lockhart, their joint president. The insolvency proceedings have continued and are now under Chapter X of the Bankruptcy Act.

Before Williams and Gibson instituted their actions, Columbia caused one of its subsidiaries to promise to pay their claims in full on completion of the work undertaken by them, which was done.

The above statement regarding Columbia's activities is derived from *In Re American Fuel & Power Co.*, (C.A. 6th Ky.) 122 F. 2d 223, 225, 226.

The Court after considering the facts said:

> "The facts in the record impel the conclusion of this court that Columbia's conduct was for the purpose of destroying the debtors and their subsidiaries, and that by its acts, it drew to itself the lifeblood of all the debtors and picked the flesh from the bones of these corporate entities and now, under the terms of the settlement approved by the lower court, is to have a share of the skeleton. (p. 228)
>
> * * * * *
>
> "Under the facts in this record no principle of equity, morals or law requires the court to approve the present claims or stock interests of the Columbia and this court should not lend its aid to further a scheme abhorrent to all recognized rules of right and justice as the facts here show." (p. 229)

Other sections of the opinion from which we have briefly quoted, give further detail as to Columbia's plot. Columbia, however, was not a party to that appeal.

Subsequently the wrongful acts of Columbia with respect to the three corporations were the subject of an opinion in an anti-trust suit against it, *Columbia Gas and Electric Corporation* v. *United States, et al.*, (1945) 151 F. 2d 461, Cert. den. 329 U. S. 737, 91 L. Ed. 636, 67 S.Ct. 48 (1946) and further factual detail is given. It seems its president had declared that "if any one thinks Columbia will allow a ditch to be dug

across the State of Ohio, he is just crazy," and that if Columbia came into the picture it would have to "put the company [American Fuel] through the wringer."

The Appellate Court sustained the finding of the trial court that Columbia, its executive officers and others, were engaged in a conspiracy the purpose and effect of which was to restrain and monopolize trade and commerce in natural gas and that it had acquired the securities of American and its subsidiaries pursuant to and in accomplishment of that conspiracy. The Court in *American Fuel & Power Co., supra*, the earlier case, had ordered that all claims and stock interest of Columbia should be rejected and Columbia take nothing thereby. The later case subordinated Columbia's claims to "the claims of all other creditors of every class".

This holding regarding subordination was later interpreted to mean that all publicly held debt of American, Inland and Kentucky Fuel ranked ahead of all claims of Columbia against any of these three companies. *In re Inland Gas Corporation* (1951) 187 F. 2d 813, 816, 817; (1954) 211 F. 2d 381, 383. At the time these later decisions were rendered all creditors of Inland, other than Columbia, had been paid or provided for and the status of the publicly held securities of American and Kentucky was under consideration.

It was because of the interrelations of American and its two subsidiaries, amounting almost to complete integration of their activities, that the court thus decided in favor of their public creditors.*

* American owns 72.6% and Kentucky Fuel 26% of Inland stock. 1.4% is held by the public. These opinions, as an initial step in determining the subordination, found that the public creditors of American and Kentucky Fuel had creditors' status in relation to Inland's surplus assets and that they shared therein in the proportion of 72.6 and 26 respectively.

Reasons for Granting the Writ

(*a*) The equity arising from Columbia's wrongful acts.

We consider that in view of the nature of Columbia's illegal acts, the subordination must necessarily be a *total* subordination of all Columbia's claims, i.e., Columbia is to gain nothing at the expense of the publicly held debt of the three companies.† To us the subordination of Columbia's claims was ordered rather than complete rejection, so that, if, after the publicly held claims were made whole, anything remained this remainder would go to the "tainted" securities held by it. See the lower court's opinion in 187 F.2d 813, 815.

The primary wrong done by Columbia was one regarding *income*. The plot was not so much to destroy the principal of the publicly held securities of Kentucky Fuel as to deprive their holders of a basic right and expectation, i.e., to have the earnings from the potentially lucrative Detroit area applied to interest rightfully becoming due and thereafter to have the claim for principal liquidated. The equity thus created naturally requires the *restoration of income* out of the earnings of Inland now available. Columbia being controlling stockholder its claim for interest should not be "insulated" and protected. *Consolidated Rock Products Co.* v. *Du Bois* (1940) 312 U. S. 510, 523, 85 L.Ed. 982, 992, 61 S.Ct. 675.

The principal amount of the publicly held bonds of Kentucky Fuel as of July 31, 1955 was $2,236,600 and the unpaid interest at that date was $3,256,100. The

† The Securities and Exchange Commission, to which the Plan in the instant case had been referred by the District Judge, adopted the same view.

principal amount of the publicly held Kentucky Fuel Debentures on that date was $542,000 and the interest due was $886,600. (p. 5 of the Plan before the court below, p. 58-A, Allen App.) If this interest is not paid according to the equities of the case, Columbia under the decision below receives it. It will then not only have accomplished its purpose but will have also received a goodly percentage of the money it laid out.

(*b*) The conflicting views in the court below.

The opinion below denying post-bankruptcy interest (one judge dissenting) held that *The City of New York* v. *Saper* (1949) 336 U. S. 328, 93 L.Ed. 710, 69 S.Ct. 554, prevailed over the equitable right of the publicly held Kentucky Fuel funded debt to receive post-bankruptcy interest.

The *Saper* case, denying post-bankruptcy interest on a tax claim, seems to us to enunciate a rule of convenience based historically on cases in which no reorganization in the modern sense was ever contemplated, and in which, by reason of complete and irretrievable insolvency, a "winding up" should in all justice occur immediately upon the occurrence of bankruptcy.

In discussing the question of allowing interest on unsecured debts in bankruptcy proceedings Mr. Justice Holmes in *Sexton* v. *Dreyfus* (1911) 219 U. S. 339, 55 L.Ed. 244, 31 S.Ct. 256, an opinion much relied on in the *Saper* case, says:

> "The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. If, as in a well known illustration of Chief Justice Shaw's, *Parks* v. *Boston*, 15 Pick. 198, 208, the whole matter could be settled in a day by a

> pie-powder court, the secured creditor would be called upon to sell or have his security valued on the spot, would receive a dividend upon that footing, would suffer no injustice, and could not complain." (pp. 344-5)

A "pie-powder" court would seem out of place in a Chapter X proceeding.

When *Sexton* v. *Dreyfus*, *supra*, was decided, Chapter X of the Bankruptcy Act, dealing with corporate reorganizations, was non-existent. In view of certain sections of Chapter X, such as Section 102 (11 U.S.C. § 502), Section 106 (1) and (4)) (11 U.S.C. § 506 (1) and (4)), Section 200 (11 U.S.C. § 600) and Section 216 (1) and (14) (11 U.S.C. § 616 (1) and (14)), it seems that various sections of the older law, such as Section 57 n (11 U.S.C. § 93 n) Section 63 (11 U.S.C. § 103) and Section 64 (11 U.S.C. § 104) should not be rigid rules. Section 102, *supra*, especially recognizes this distinction. Furthermore, no order under Section 102, applying Chapters I to VII of the Bankruptcy Act, has been entered herein.

The minority opinion below seems to reach the heart of the problem. It quoted with approval from *Vanston* v. *Green** (1946) 329 U. S. 156, 91 L.Ed. 162, 67 S.Ct. 237 and other authorities as follows:

> **"Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. 'It is manifest,' said Mr. Justice Black, for the majority, in Vanston Bondholders**

* The Vanston Committee, petitioner, became a party to the Inland and Kentucky Fuel proceedings shortly after their inception and *Vanston* v. *Green*, *supra*, resulted from an appeal on the question of interest on interest, which had arisen in *In re American Fuel & Power Co.* (1945) 151 F. 2d 470.

Protective Committee v. Green, 329 U. S. 156, 67 S.Ct. 237, 241, 91 L.Ed. 162, 'that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor.' It is clear to the writer * * * that, as said in Sampsell, 313 U. S. at page 219, 61 S.Ct. at page 907, 'The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete,' and the further observation that 'To bring himself outside of that rule* an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice.' That such burden is fully borne here and by our earlier decisions amply demonstrated." (App., pp. 15a and 16a)

As we read the majority opinion below, we think the following quotations represent its basic holding:

"* * * For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors."

"Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied." (App., p. 20a)

* * *

"*In re Deep Rock Oil Corp.*, 10 Cir., 113 F. 2d 266, certiorari denied *Standard Gas & Electric Co. v. Taylor*, 311 U. S. 699, 61 S.Ct. 138, 85 L.Ed. 453, lends some support to appellants' contention." (App., p. 23a)

* Presumably equality of distribution among unsecured creditors.

The *Deep Rock* case, above cited, is not, in our view, in any way over-ruled by the *Saper* case. Also, the *Deep Rock* case dealt with an equity somewhat similar to the one here involved whereas the *Saper* case was devoted mainly to the ranking of claims and did not discuss any of the equitable principles enunciated in the *Deep Rock* case, or the earlier case of like purport, *Taylor* v. *Standard Gas & Electric Company* (1939), 306 U.S. 307, 83 L.Ed. 669, 59 S.Ct. 543.

The instant litigation should be decided on the strength of the equity involved rather than, if we may so express it, on the strength of a barrier derived from decisions, such as the *Saper* case, not involving any such equity.

Furthermore, as we see it, this barrier has already been pierced in the instant case. The Court below has held that the debt claim for the principal of the publicly held Kentucky Fuel Bonds and Debentures has an equity in its favor which is so strong that it cuts through the barrier consisting of the debt claim of Columbia for principal.

After examining the Balance Sheet and Earning Statement published by the Inland Trustee as of June 30, 1957*, we believe that if Inland's present assets were distributed to its present creditors, in the order provided in the Plan before the lower court, they would come within approximately $750,000 of liquidating the amounts due for principal and interest to date on the

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* This document is annexed as Appendix E, p. 32a, and we trust properly so.

publicly held Bonds and Debentures of Kentucky Fuel.*

In arriving at the above figure we have not taken into account increases in value due to (1) the recent general rise in prices, (2) the able management of the bankruptcy Trustee and (3) the full results of the favorable contract, mentioned in the Plan, which he negotiated in October, 1955 with Tennessee Gas Transmission Company to supply Inland with 38,000,000 cubic feet of gas per day until October 1, 1971. These increases are probably sufficient to make up the above deficiency of approximately $750,000. In the meantime Inland is earning, after ordinary income taxes, over $800,000 a year.

(c) Conflicting holdings by Courts of Appeal.

Aside from the equities in the present case, we consider that *In re Deep Rock Oil Corp.*, (C. C. A. 10th) *supra*, supports the minority opinion below. We respectfully submit that the majority opinion in the lower court in noting that this case "lends some support to appellants' contention" fails to recognize that the Court of Appeals for the Tenth Circuit would doubtless decide the instant case so as to uphold such contention. *In re Deep Rock Oil Corp., supra*, confirmed a plan following the earlier Supreme Court opinion, in that case, *Taylor* v. *Standard Gas & Electric Company*,

* We derive the figure by (1) using the appraisal of the Inland properties made as of October 1, 1955, mentioned in the Plan, (2) using the figures shown in Appendix E to recast Exhibit J and the related schedules of the Plan and (3) allowing for reorganization expenses paid in the first half of 1957, and noting that Inland has among its current assets cash and U. S. Treasury Notes of approximately $3,140,000, which until the recent advance in rates on government securities earned very little income. (See pp. 58a, 62a, and 80a, Allen App.)

supra. The opinion confirming the plan dealt with the following claims against Deep Rock: $10,000,000 principal amount of publicly held notes, $5,000,000 par amount of publicly held preferred stock and a large debt claim held by Standard Gas & Electric Company. The opinion of the Supreme Court was construed to mean that interest should be paid on the publicly held notes even though Standard's debt claim was subordinate to the notes and preferred stock. As a result, Standard was allowed no participation in the Deep Rock assets.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

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July 29, 1957.

APPENDIX A.

Order of H. Church Ford, U. S. D. C. J., dated March 14, 1956, From Which Appeal Was Taken to United States Court of Appeals for the Sixth Circuit.

This cause came on for hearing on March 8, 1956, at Lexington, in said district, pursuant to notice duly given as provided by law.

Thereupon the Court proceeded to consider the petition of Clinton M. Harbison, Trustee of American Fuel & Power Company, praying that the Court confirm the "Amended Plan of Reorganization dated February 12, 1953, as further amended September 23, 1955, and as finally amended", under the provisions of Sections 179 and 216(7) of the Bankruptcy Act, regardless of the fact that two-thirds in amount of the public holders of Kentucky Fuel Gas Corporation bonds have not accepted said plan. And the Court heard testimony offered in support of the confirmation of said plan and also heard argument of counsel in favor of the confirmation of said plan, by Counsel for said Clinton M. Harbison, Trustee as aforesaid, and by counsel for Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, and by counsel for various interested creditors herein, and also heard argument of counsel for Paul E. Kern and counsel for certain American Fuel & Power Company stockholders in opposition to the confirmation of said plan. The Court also heard a statement by counsel for the Securities Exchange Commission to the effect that further consideration of the confirmation of said plan should await a determination of the federal income tax ques-

tion raised by petition filed herein by Ben Williamson, Jr., Trustee as aforesaid, and hereinafter mentioned.

Without making any decision upon said petition of Clinton M. Harbison, Trustee as aforesaid, the Court called up for consideration the petition filed herein by said Ben Williamson, Jr., Trustee as aforesaid, for an adjudication that no federal income tax liability will be incurred by the estates of the Debtors by reason of the sale of certain assets as provided in said Plan, and for injunctive relief. Thereupon came Henry J. Cook, United States Attorney, and C. S. Titus, special counsel, and appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for the District of Kentucky, and filed a motion to dismiss said petition of Ben Williamson, Jr., Trustee, for want of jurisdiction. After hearing argument of counsel on said motion, the Court was of opinion that said petition is in effect an application for a declaratory judgment and under the provisions of the Federal Declaratory Judgment Act this Court is without jurisdiction to entertain the petition. Whereupon it is ORDERED that said motion be and the same is hereby sustained and said petition of Ben Williamson, Jr., Trustee as aforesaid, is hereby dismissed.

The Court then proceeded to consider further the above mentioned petition of Clinton M. Harbison, Trustee as aforesaid, to confirm said plan. And thereupon the Court announced from the bench that he was of opinion that the public holders of bonds and debentures of Kentucky Fuel Gas Corporation, being unsecured creditors, are not entitled to post-bankruptcy interest on their claims and that said plan is erroneous

in allowing such post-bankruptcy interest, and for that reason, and for the further reason that the Court lacks jurisdiction and hence cannot pass upon the tax question presented by said petition of Ben Williamson, Jr., Trustee as aforesaid, and because of the uncertainty resulting from such undetermined tax question, the Court was of opinion that the plan should not be confirmed. Whereupon it is ORDERED that said petition of Clinton M. Harbison, Trustee as aforesaid, be and the same is hereby dismissed and confirmation of said plan is denied.

The Court then proceeded to consider the proposed plan of reorganization offered by Paul E. Kern, and dated July 7, 1955, and the Court was of opinion that said Kern plan is not worthy of consideration for the reason that it proposes to encumber the reorganized corporation with a heavy indebtedness, and for other reasons stated from the bench. Whereupon it is ORDERED that said Kern Plan be and it is hereby adjudged not worthy of consideration within the meaning of Chapter X of the Bankruptcy Act.

The Court then directed the Trustees herein to prepare and file a new Plan of Reorganization which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation.

Robert S. Spilman, Jr., counsel for certain stockholders of American Fuel & Power Company then moved the Court to require Ben Williamson, Jr., Trustee as aforesaid, to mail to him certain statements with respect to the business and operations of Inland Gas Corporation. Whereupon it is ORDERED that said Trustee shall forthwith furnish to said counsel copies of monthly reports gotten out by said Trustee for the year 1955, and hereafter furnish to said counsel copies

of all reports with respect to Inland Gas Corporation and its business and operations which are furnished by said Trustee to other counsel of record in this proceeding.

March 14, 1956

Enter:

(s) H. Church Ford
Judge

APPENDIX B.

Opinion of United States Court of Appeals for the Sixth Circuit, dated February 14, 1957.

In re INLAND GAS CORPORATION, Debtor.

In re KENTUCKY FUEL GAS CORPORATION, Debtor.

In re AMERICAN FUEL & POWER COMPANY et al., Debtors.

Nos. 12861-12867.

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge.

After more than twenty six years of Receiver and Trustee operation of the Debtors' properties, of litigation delaying reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas &

Electric Corporation v. United States, 6 Cir., 151 F.2d 461, modification denied, 6 Cir., 153 F.2d 101, certiorari denied 329 U.S. 737, 67 S.Ct. 48, 91 L.Ed. 636; In re Inland Gas Corporation, 6 Cir., 187 F.2d 813; In re Inland Gas Corporation, 6 Cir., 208 F.2d 13; In re Inland Gas Corporation, 6 Cir., 211 F.2d 381, certiorari denied Kern v. Williamson, 348 U.S. 840, 75 S.Ct. 45, 99 L.Ed. 662; In re Inland Gas Corporation, 6 Cir., 217 F.2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan entitled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Court circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modifications. The important new developments consisted of a substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets

of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so, the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offered $8,000,000.00 in cash for the same properties which it confirmed by a deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation for the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purposes of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decision is correct, the Federal tax involved would be approximately $1,492,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these rulings and as an assumed result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government

is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202, it was without jurisdiction to entertain it. Whereupon, it ordered that the petition of the Trustee be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors, were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganized corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as evidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corpora-

tion from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unnecessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed" so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in a Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for

a successful and prompt reorganization by the $8,000,000.00 offer received by Tennessee. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and the release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the petitions, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U.S.C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421 of the Internal Revenue Code of 1954; 26 U.S.C.A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C.F.R. § 1.337-2(b). The problem with which § 337 was concerned arose out of the decisions in Commissioner v. Court Holding Co., 324 U.S. 331, 65 S.Ct. 707, 89 L.Ed. 981, and United States v. Cumberland Public Service Co., 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re. American Fuel & Power Co., 6 Cir., 151 F.2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F.2d 813, 819, we said: "The order will be amended by direction to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered to those rulings. 217 F.2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland

stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) If the alleged bankrupt proves solvent, post-bankruptcy interest is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bankruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period a difference of opinion as to allowance of interest on tax claims. They were considered in some jurisdictions as claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the light of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr.

Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S.Ct. 237, 241, 91 L.Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F.2d 266, certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, and its predecessor, Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 618, 59 S.Ct. 543, 83 L.Ed. 669, that, as said in Sampsell, 313 U.S. at page 219, 61 S.Ct. at page 907, "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further observation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F.2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation,

for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan of reorganization, which may or may not contain a provision for sale of the properties, or which may or may not submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems here involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted, we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debentures ask us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on

the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12855, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, Circuit Judge.

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 163, 67 S.Ct. 237, 91 L.Ed. 162; Sexton v. Dreyfus, 219 U.S. 339, 344, 31 S.Ct. 256, 55 L.Ed. 244; City of New York v. Saper, 336 U.S. 328, 330-331, 69 S.Ct. 554, 93 L.Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U.S. 261, 267, 34 S.Ct. 502, 58 L.Ed. 949; City of New York v. Saper, supra, 336 U.S. 328, at page 330, 69 S.Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle of the debt secured, the excess should be applied to post-bankruptcy interest on the

obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F.2d 611, 613, certiorari denied McInnis v. Weeks, 345 U.S. 958, 73 S.Ct. 940, 97 L.Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 and Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp., 5 Cir., 149 F.2d 199, 200. A denial of this right is in substance

a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On the contrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York v. Saper, supra, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U.S.C.A. The Court said 336 U.S. at page 337, 69 S.Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64, sub. a, and 57, sub. n [11 U.S.C.A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X. United States v. Edens, 4 Cir., 189 F.2d 876, affirmed 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F.2d 80, affirmed 342 U.S. 912, 72 S.Ct. 358, 96 L.Ed. 682; Pavone Textile Corp. v.

Bloom, 302 N.Y. 206, 97 N.E.2d 755, affirmed sub nom., United States v. Bloom, 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F.2d 10, certiorari denied 342 U.S. 918, 72 S.Ct. 364, 96 L.Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F.2d 865, certiorari denied 348 U.S. 830, 75 S.Ct. 53, 99 L.Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F.2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp., supra, 5 Cir., 149 F.2d 199; United States v. Paddock, 5 Cir., 187 F.2d 271, 276; Application of Progress Shoe Co., D.C.E.D.N.Y., 107 F.Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N.E.2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U.S. 156, 67 S.Ct. 237, 240, 91 L.Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U.S. at page 166, 67 S.Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called

for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F.2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, Circuit Judge.

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28, U.S.C. provides: "In a case of actual con-

troversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the Declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies; and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court

sitting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule." The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. * * *"

Study of the history of the Act reveals that the words, "except with respect to Federal taxes" upon which this issue turns were not a part of the original

statute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori,* an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he, as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U.S.C., as follows: "§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee of the debtor corporations is on the same footing with any other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solvent* corporation engaged in a reorganization may have an equally large amount of tax liability, contingent upon the outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *insolvent* corporation should be in a preferred position. The possible loss of a favorable business transaction is insufficient reason of itself to create the extraordinary circumstances necessary for

the injunctive relief sought by appellant. The Internal Revenue Code of 1954, section 7421, states the general rule: "(a) Tax. * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This restraint against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509, 52 S.Ct. 260, 263, 76 L.Ed. 422.

This court has held that any exception to the universality of the application of section 7421 of the Internal Revenue Code must turn upon "present extraordinary and entirely exceptional circumstances." John M. Hirst & Co. v. Gentsch, 6 Cir., 1943, 133 F.2d 247, 248. We stated there that the "circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued." In my judgment, departure from the clear statutory prohibition is not warranted in the present circumstances.

Inasmuch as the United States District Court had no jurisdiction over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commissioner as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reasons stated by him, that post-bank-

ruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax liability for lack of jurisdiction should, in my judgment, be affirmed.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit
No. 12,861

Ben Williamson, Jr., Trustee of Inland Gas Corporation, and
Kentucky Fuel Gas Corporation, - - Appellants,

v.

Securities and Exchange Commission, - Appellee.

ORDER.

Before SIMONS, Chief Judge, MARTIN and MILLER, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) Charles C. Simons
Chief Judge

Filed
February 14, 1957
Carl W. Reuss, Clerk

A True Copy
Attest:
Carl W. Reuss, Clerk
By Grace Keller
Deputy Clerk

(Seal)

APPENDIX D.

COPY

Nos. 12,861-12,867

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
May 8 — 1957
CARL W. REUSS,
Clerk

In the Matter of
INLAND GAS CORPORATION,
Debtor,
In the Matter of
KENTUCKY FUEL GAS CORPORATION,
Debtor,
In the Matter of
AMERICAN FUEL & POWER COMPANY,
Debtor.

ORDER

Before:
SIMONS, Chief Judge,
MARTIN and MILLER, Circuit Judges.

The petitions for rehearing with requests for further oral argument en banc, filed herein by The Vanston Committee for Kentucky Fuel Gas Corporation First Mortgage Bonds, The Committee for the Holders of 6½% Debentures of Kentucky Fuel Gas Corporation, and Paul E. Kern, having been considered by the Court;

And the Court adhering to the views previously expressed in its opinion of February 14, 1957, and in conformity with its rule with respect to hearings en

banc on petitions for rehearing; *N.L.R.B.* v. *Cambria Clay Products Co.*, 229 F. (2) 433, C. A. 6th; *Northwest Airlines, Inc.* v. *Glenn L. Martin Co.*; 229 F. (2) 434, C. A. 6th;

It Is Ordered that the petitions for rehearing and requests for further oral argument en banc be denied.

Approved for entry:

/s/ Shackelford Miller, Jr.
U. S. Circuit Judge

Simons, Chief Judge, dissenting. While I agree with that part of the order in the above causes which rejects the suggestion contained in the petitions for rehearing therein by the full membership of the court sitting en banc, contrary to our practice, I am of the opinion that the petitions for rehearing on the subject of post-bankruptcy interest should be granted, for the reasons developed in my original opinion in the case.

APPENDIX E.

INLAND GAS CORPORATION
(INCORPORATED)
BEN WILLIAMSON, JR., TRUSTEE
ASHLAND, KENTUCKY

July 15, 1957

TO THE CREDITORS OF
KENTUCKY FUEL GAS CORPORATION:

Enclosed you will find comparative Balance Sheet of the Inland Gas Corporation as of June 30, 1957, and comparative Statement of Earnings for the six months ended June 30, 1957.

The purpose in sending the Inland statement to you is that Kentucky Fuel creditors, by virtue of their stock ownership, have a vital interest in Inland's operations.

BEN WILLIAMSON, JR., TRUSTEE
INLAND GAS CORPORATION

BEN WILLIAMSON, JR., TRUSTEE
KENTUCKY FUEL GAS CORPORATION

BEN WILLIAMSON, JR., TRUSTEE

INLAND GAS CORPORATION

(COMBINING ACCOUNTS OF CORPORATION AND TRUSTEE)

COMPARATIVE BALANCE SHEET AS OF JUNE 30, 1957

Assets and Other Debits	At June 30, 1957	At December 31, 1956	Increase or *Decrease*
CURRENT ASSETS:			
Cash	$1,552,635.38	$1,649,905.49	$502,729.89
United States Treasury Notes	1,591,546.88	1,500,000.00	91,546.88
Accounts Receivable — Customers	481,073.58	519,886.91	*38,813.33*
Accounts Receivable — Others	8,562.42	9,720.58	*1,158.16*
Accounts Receivable — Associated Companies	75,919.54	56,673.44	19,246.10
Interest Receivable	1,657.46	12,578.12	*10,920.66*
Prepayments	32,585.54	32,305.10	280.44
Materials and Supplies	226,495.78	207,941.11	18,554.67
TOTAL CURRENT ASSETS	$3,970,476.58	$3,389,010.75	$581,465.83
FIXED ASSETS:			
Gas Plant	$8,711,958.96	$8,623,713.59	$ 88,245.37
Less: Accrued Depreciation, Depletion and Amortization	5,734,508.70	5,604,307.65	130,201.05
	$2,977,450.26	$3,019,405.94	*$ 41,955.68*
Construction Work in Progress	69,940.12	24,898.89	45,041.23
TOTAL FIXED ASSETS	$3,047,390.38	$3,044,304.83	$ 3,085.55
TOTAL CURRENT AND FIXED ASSETS	$7,017,866.96	$6,433,315.58	$584,551.38
OTHER ASSETS:			
Investments in and claims against companies in bankruptcy:			
Investments	$ 38,500.00	$ 38,500.00	$ —0—
Claims	35,167.58	35,167.58	—0—
	$ 73,667.58	$ 73,667.58	$ —0—
Miscellaneous Intangible Capital	850,437.00	850,437.00	—0—
TOTAL OTHER ASSETS	$ 924,104.58	$ 924,104.58	$ —0—
Deferred Charges	$ 5,627.48	$ 12,573.37	*$ 6,945.89*
TOTAL ASSETS AND OTHER DEBITS	$7,947,599.02	$7,369,993.53	$577,605.49

(Italics denote negative amounts)

BEN WILLIAMSON, JR., TRUSTEE

INLAND GAS CORPORATION

(COMBINING ACCOUNTS OF CORPORATION AND TRUSTEE)

COMPARATIVE BALANCE SHEET AS OF JUNE 30, 1957

Liabilities and Other Credits	At June 30, 1957	At December 31, 1956	Increase or *Decrease*
CURRENT LIABILITIES:			
Accounts Payable	$ *369,116.24*	$ 389,809.64	$ *20,693.40*
Accounts Payable — Associated Companies	*222.96*	394.32	*171.36*
Customers' Deposits	82.73	82.73	—0—
Accrued Taxes (other than Income)	87,006.31	4,309.00	82,697.31
Accrued Taxes on Income (Estimated)	200,000.00	168,000.00	32,000.00
Other Current and Accrued Liabilities	14,950.81	10,331.48	4,619.33
TOTAL CURRENT LIABILITIES	$ 671,379.05	$ 572,927.17	$ 98,451.88
OTHER LIABILITIES	$ 131,418.23	$ 119,622.59	$ 11,795.64
GENERAL CREDITORS' CLAIMS	$ 952,464.31	$ 941,568.73	$ 10,895.58
CLAIMS OF COLUMBIA GAS AND ELECTRIC CORPORATION subordinated "to the claims of all other creditors of every class" by order of the United States Circuit Court of Appeals, Sixth Circuit, in the case of Columbia Gas and Electric Corporation v. U. S., et al., 151 F. (2d) 461	$5,719,089.04	$5,648,626.12	$ 70,462.92
COMMON STOCK	$2,126,587.00	$2,126,587.00	$ —0—
EARNED SURPLUS	*$1,653,338.61*	*$2,039,338.08*	$385,999.47
TOTAL LIABILITIES AND OTHER CREDITS	*$7,947,599.02*	*$7,369,993.53*	$577,605.49

(Italics denote negative amounts)

* * * * * * * * * *

STATUS PENSION PLAN II

Full Amount Paid	*Less Amortization*	*Unamortized Balance*
Kentucky Trust Company, Trustee		
$84,890.00	$48,104.56	$36,785.44

BEN WILLIAMSON, JR., TRUSTEE

INLAND GAS CORPORATION

(COMBINING ACCOUNTS OF CORPORATION AND TRUSTEE)

COMPARATIVE STATEMENT OF EARNINGS

	Six Months Ended		Increase or *Decrease*
	June 30, 1957	June 30, 1956	
GROSS REVENUES:			
Gas — Industrial	$3,094,069.50	$3,054,587.26	*$ 50,517.76*
— Wholesale	1,468.40	1,275.60	192.80
— Sales to Associated Companies	*208,776.04*	*217,013.21*	*8,237.17*
— Other	28,384.12	*28,633.15*	*249.03*
	$3,242,698.06	$3,301,509.22	*$ 58,811.16*
Miscellaneous	5,168.92	5,473.88	*304.96*
TOTAL REVENUE	$3,247,866.98	$3,306,983.10	*$ 59,116.12*
OPERATING EXPENSES:			
Gas Purchased — Associated Companies	$ 2,172.48	$ 2,370.84	*$ 198.36*
— Other	1,965,698.05	*2,059,200.08*	*93,502.03*
TOTAL GAS PURCHASED	$1,967,870.53	$2,061,570.92	*$ 93,700.39*
Operation	321,185.45	304,199.53	16,985.92
Maintenance	40,286.90	36,776.78	3,510.12
Depreciation, Depletion and Amortization	130,387.68	120,117.66	10,270.02
Taxes (other than Income)	96,427.83	92,175.48	4,252.35
TOTAL OPERATING EXPENSES	$2,556,158.39	$2,614,840.37	*$ 58,681.98*
NET OPERATINC REVENUE	$ 691,708.59	$ 692,142.73	*$ 434.14*
OTHER INCOME	5,660.73	23.55	5,637.18
GROSS INCOME	$ 697,369.32	$ 692,166.28	$ 5,203.04
Other Interest	81,358.50	81,358.50	—0—
NET INCOME (before Taxes)	$ 616,010.82	$ 610,807.78	$ 5,203.04
Taxes on Income (Estimated)	200,000.00	200,000.00	—0—
NET INCOME	$ 416,010.82	$ 410,807.78	$ 5,204.04

(Italics denote negative amounts)

NOS.

325
336
342

Nos. 325, 336 and 342

SEP 9 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 325 VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, *Petitioner,* *vs.* THE COLUMBIA GAS SYSTEM, INC., *Respondent.*	On Petitions for Writ of Certiorari
No. 336 Committee for Holders of KENTUCKY FUEL GAS CORPORATION 6½% Debentures, *Petitioner.* *vs.* THE COLUMBIA GAS SYSTEM, INC., *Respondent.*	
No. 342 PAUL E. KERN, a Holder of KENTUCKY FUEL GAS CORPORATION First Mortgage Bonds and 6½% Debentures, *Petitioner,* *vs.* THE COLUMBIA GAS SYSTEM, INC., *Respondent.*	

Consolidated Brief of The Columbia Gas System, Inc. in Opposition to the Above-Captioned Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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DEFINITIONS AND REFERENCES

American Fuel, Inland and Kentucky Fuel: Respectively, American Fuel and Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, the debtors in the three proceedings under Chapter X* of the Bankruptcy Act in the District Court.

Post-Bankruptcy Interest: Interest after the institution of a receivership, bankruptcy or reorganization proceedings; this term is generally used in bankruptcy cases whether in proceedings for liquidation, reorganization or arrangement.

Emphasis has been supplied and parallel citations have been omitted in quotations throughout this Brief.

Citations to the opinion below are to the reproduction thereof contained in the Appendix of the Petition of Vanston Bondholders Protective Committee (No. 325).

Note As to the Record.

Certain portions of the original record before the District Court were printed for the use of the Court of Appeals in Cases No. 9775-77 (prior appeals in these proceedings reported at 151 F. 2d. 461 (1945)). In the appeals below these portions of the record were transmitted and certified by the District Court in the form of these printed volumes in lieu of original record and have also been transmitted and certified to this Court in this form. References thereto are designated: 1945 Rec.

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*The various Chapters and Sections of the Bankruptcy Act are fully cited in the Table of Authorities and are referred to herein only by original Chapter and Section numbers.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Although Petitioners all represent Bonds or Debentures of Kentucky Fuel, their statements of "Questions Presented" vary and overlap. We submit the following as the questions presented:

(1) Is it the general rule of law that interest on unsecured claims against an insolvent Debtor (including a Debtor in proceedings under Chapter X of the Bankruptcy Act) ceases to accrue at the institution of bankruptcy proceedings?

(2) Was it error or an abuse of discretion for the Court of Appeals to adhere to that general rule (affirming the District Court in that regard) in the circumstances of this case?

COUNTERSTATEMENT OF THE CASE

(a) Introductory

The three Petitions seek writs of certiorari to a decision which applied, in a Chapter X reorganization, to a complicated security structure involving complex intercorporate relationships set against the background of many years of litigation, the well-established rule that unsecured claims do not bear post-bankruptcy interest.

Respondent holds direct secured claims against the debtor Inland, which have (by a prior decision in the same proceeding) been subordinated for equitable reasons to the claims of other creditors. On several prior occasions, disallowance of Respondent's claims has been sought in but denied by the Court of Appeals. Petitioners hold or represent unsecured claims of a *separate but affiliated* debtor corporation, Kentucky Fuel, and (by another prior decision in the same proceeding) have been held for equitable reasons to be "quasi-creditors"* of Inland.

*See pp. 6-8, *infra*.

In this somewhat complicated situation, the District Court held that Petitioners should not be awarded post-bankruptcy interest on their claims. The Court of Appeals affirmed (one Judge dissenting). Both courts have had very long experience with the tangled affairs of the debtor corporations.

Both courts recognized that this holding will result in some recovery on account of Respondent's subordinated claims. The Court of Appeals' opinions show that it was aware of the full extent of its equitable powers but all three judges again agreed that Respondent's claims should not be disallowed. Two judges refused further to subordinate Respondent's claims by awarding post-bankruptcy interest on the "quasi-creditor" claims of Petitioners prior to payment of principal on Respondent's subordinated claims against Inland. The dissenting judge disagreed and thought that post-bankruptcy interest should be awarded on the unsecured "quasi-creditor" claims.

A long history precedes the decision below.

We shall not summarize the early history (1927-1929) of the debtor corporations or of Respondent's purchases for value of their securities during 1930 which resulted in its acquiring control. We do not conceive it necessary for this Court to reappraise the equities involved in that history which led the Court below in 1945 to order a subordination of Respondent's claims.

All three Petitions give highly colored summaries of the events on which the subordination is based. All three base their "Statements" on an opinion of the Court of Appeals which that Court now regards as superseded. That opinion, *In re American Fuel & Power Co.*, 122 F. 2d 223 (1941), was rendered in proceedings to which Respondent was not a party and, to a large extent, on the basis of allegations in pleadings (see 1945 Rec. V. 1., pp. 211-26). In a subsequent decision, to which Respondent was a party and

which was rendered on a complete record, the Court of Appeals said, with respect to its 1941 opinion:

> "... We are not obliged to consider whether, *upon the facts there assumed*, the American Fuel and Power case was rightly decided, or its mandate broader than the issues required. Columbia was not bound by it, the present record is complete, and the principle of 'the law of the case' does not govern our decision. ..." (151 F. 2d 461, 463 (1945))

That the Court of Appeals does not regard its 1941 opinion as presently pertinent to this case is further shown by the fact that in the second paragraph of the opinion below Judge Simons cites all of the Court's prior decisions *beginning* with that in 151 F. 2d 461 (1945) and omits reference to the 1941 opinion.

In so far as this Court finds it necessary, on these Petitions, to appraise the events upon which the Court of Appeals based its various decisions subordinating Respondent's claims, the District Court's findings of fact as to those events are set forth in the record (1945 Rec. V. 1, pp. 590-603). Those findings (although vigorously disputed by Respondent) were affirmed by the Court of Appeals in its 1945 decision.

(4) The Court of Appeals' Initial Decision Subordinating Respondent's Claims (1945)

On the basis of those findings the Court of Appeals (151 F. 2d 461) ordered, in each of the three pending Chapter X proceedings, that the claims of Respondent against the debtors be subordinated to the claims of other creditors. The total amounts of the claims (and the amounts held by Respondent) prior to that decision, and whose priority was thereby affected, were as follows*:

*We omit claims against American Fuel as not here pertinent, because creditors of American Fuel were not appellants below on the post-bankruptcy interest issue and are not parties to these Petitions.

Inland: $4,254,700 principal amount of First Mortgage Bonds (Respondent: $1,596,600); $1,450,000 principal amount of Debentures, secured by a second mortgage (Respondent: $320,100); $400,000 principal amount of Notes, all held by American Fuel and secured by the same second mortgage; and general claims in principal amount of $598,417 (Respondent: $252,313). —an aggregate of $6,703,117.

Kentucky Fuel: $3,939,500 principal amount of First Mortgage Bonds (Respondent: $1,702,900); $939,600 principal amount of unsecured debentures (Respondent: $397,600) and general claims in principal amount of $152,859 (Respondent: $65,607)—an aggregate of $5,031,959.*

(c) Events Subsequent to the 1945 Decision Ordering Subordination

During the 12 years elapsed since the Court of Appeals' 1945 decision, these debtors and their estates have presented a twofold history: sound and successful business operation (the business being Inland's, the owner of the operating properties); frustration and litigation in all efforts to reorganize (much of the litigation caused by the holders of securities of Kentucky Fuel and American Fuel**).

Under the custody of the District Court, and the business guidance of an able Trustee, the Inland gas enterprise has made sound and steady operating progress. The present Inland Trustee has taken full advantage of the post-World War II growth in the natural gas industry and his

*See Plan of Reorganization, dated Feb. 12, 1953, as Further Amended Sept. 23, 1955, and as Finally Amended, pp. 3-5, Exhibits A and B.

**Far and away the major part of these securities (and depositary certificates representing them) had been purchased during the pendency of the proceedings, at tremendous discounts from principal amount, for speculative purposes. See pp. 28-30, *infra*.

sound management during this period made it possible to pay full principal and interest to the date of payment on all of Inland's First Mortgage Bonds and Debentures and Notes (secured by second mortgage) other than those owned by Respondent.

In the foregoing paragraph we refer to the Trustee of *Inland* because it is Inland's business and Inland's properties which lie at the base of any value for the securities of the three debtor companies.

American Fuel has always been a holding company; it owns 72.6% of the stock of Inland, 99% of the stock of Kentucky Fuel and 100% of the stock of certain other companies not important to the issues here involved.

Kentucky Fuel originally was in part a holding company and in part an operating company. It owns 26% of the stock of Inland* and at one time owned certain gas production properties. It was on the basis of the pledge of these properties that its First Mortgage Bonds were issued. Under Court Order in 1939, they were sold at public auction to the Inland Trustee for $151,000; subsequently, the proceeds of this sale and the bulk of treasury cash were distributed to the bondholders other than Respondent and thus the bondholders became the holders of deficiency claims on a par with the unsecured Debentures. Thereafter, Kentucky Fuel was purely a holding company.**

However, reorganization proceedings in the District Court met with continual frustration. During the years following the 1945 subordination of Respondent's claims, successive appeals from District Court orders relating to successive plans were taken by various parties, resulting in decisions by the Court of Appeals reported in *In re Inland Gas Corp.*, 187 F. 2d 813 (1951) (5 appeals); *In re Inland Gas Corp.*, 208 F. 2d 13 (1953); *In re Inland Gas Corp.*, 211

*The remaining 1.4% of the stock of Inland is publicly held.

**See 208 F. 2d 13, 14 (1953).

F. 2d 381, *cert. denied*, 348 U. S. 840 (1954) (4 appeals); *In re Inland Gas Corp.*, 217 F. 2d 207 (1954); and *In re Inland Gas Corp.*, 241 F. 2d 374 (1957) (7 appeals), the decision to which writs of certiorari are now sought.

Through all these decisions the Court of Appeals has shown great awareness of its equity powers. As values of the Inland business and properties increased, the Court has been resourceful in developing new legal concepts to arrive at results which it believed equitable.

(d) The Court of Appeals' Modification Which Made Kentucky Fuel Creditors "Quasi-Creditors" of Inland (1951)

A plan of reorganization was prepared in accordance with the 1945 subordination decision and in 1950 was approved by the District Court. By that time, cash generated from successful operations had been applied to pay the full principal of the Inland First Mortgage Bonds (owned by others than Respondent) plus interest to date of payment, and the plan made provision equivalent to payment of the full principal of the secured Inland Debentures (owned by others than Respondent) and Inland Notes plus interest to the date of payment. As a surplus of Inland assets existed, the plan provided a minor participation for Respondent's subordinated claims against Inland.

The creditors of Kentucky Fuel and American Fuel appealed to the Court of Appeals for equitable intercession, whereupon that Court reversed the District Court and denominated the creditors of Kentucky Fuel and American Fuel as "quasi-creditors" of Inland and modified its previous mandate to direct the District Court to

> "'. . . assign the residue of Inland assets over its debts, exclusive of Columbia's claims, to the account of their public creditors [the public creditors of American Fuel and Kentucky Fuel] according to the respective stock interests of 72.6% for American

> and 26% for Kentucky . . . [W]e are unable to make any provision for the minor interest of 1.4% of the common stock of Inland directly held by public investors. . . The holders of such stock were in no sense creditors." ('87 F. 2d 813, 817)*

Thus, for the second time, the Court of Appeals, as a court of equity, altered the priorities of the creditors. The creditors of Kentucky Fuel were elevated to the status of "quasi-creditors" of Inland to the extent of 26% of the assets of Inland available after the satisfaction of Inland's creditors other than Respondent but before the satisfaction of Respondent's secured claims against Inland.

(e) The Court of Appeals' Modification Giving Further Equitable Benefits to Kentucky Fuel Creditors (1954)

Further successful operation of Inland increased the cash available for distribution. The remaining assets of Inland which were assigned to American Fuel creditors (72.6%) on the "quasi-creditor" theory were more than adequate to provide for payment of the claims against it.

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*The Court of Appeals explained its decision:

> " . . . we think that the public security holders whose investments were guaranteed and supported by a pledge of Inland stock are, in a very true sense, creditors or quasi-creditors of Inland . . ." (*id.* at 817).

It was subsequently determined by the District Court (Order entered Dec. 15, 1955) that there was no pledge of the Inland stock to secure the Kentucky Fuel Bonds. The Debentures were completely unsecured and shared "quasi-creditor" status with the Bonds only by virtue of a compromise between them which stipulated that the Bonds would receive 92% and the Debentures 8% of whatever assets of Inland were distributed to Petitioners. This was a compromise of the dispute between the Bonds and Debentures as to whether or not the Inland stock owned by Kentucky Fuel had been pledged under the mortgage under which the Bonds were issued (see Second Advisory Report of the Securities and Exchange Commission, Sept. 18, 1952, p. 33 (SEC Corp. Reorg. Rel. No. 90)); this compromise was repudiated by the Debenture Committee and, as indicated, the dispute adjudicated adversely to the Bondholders.

Thereupon, in 1954, the Court of Appeals again exercised its equitable powers on behalf of Petitioners and (in further subordination of Respondent's claims) directed that after application of such of the Inland assets as were necessary to pay the claims of American Fuel creditors (other than those of Respondent)

> ". . . The balance remaining is to be assigned to the payment of Kentucky's secured [*] obligations. This will give Kentucky something more than 26% of Inland's surplus but will still fall far short of liquidating Kentucky's securities." 211 F. 2d 381, 383

In diagrammatic form the structure of debt securities of the three debtor corporations thus resulting from the alterations of priorities by the various Court of Appeals' decisions may be shown as follows:

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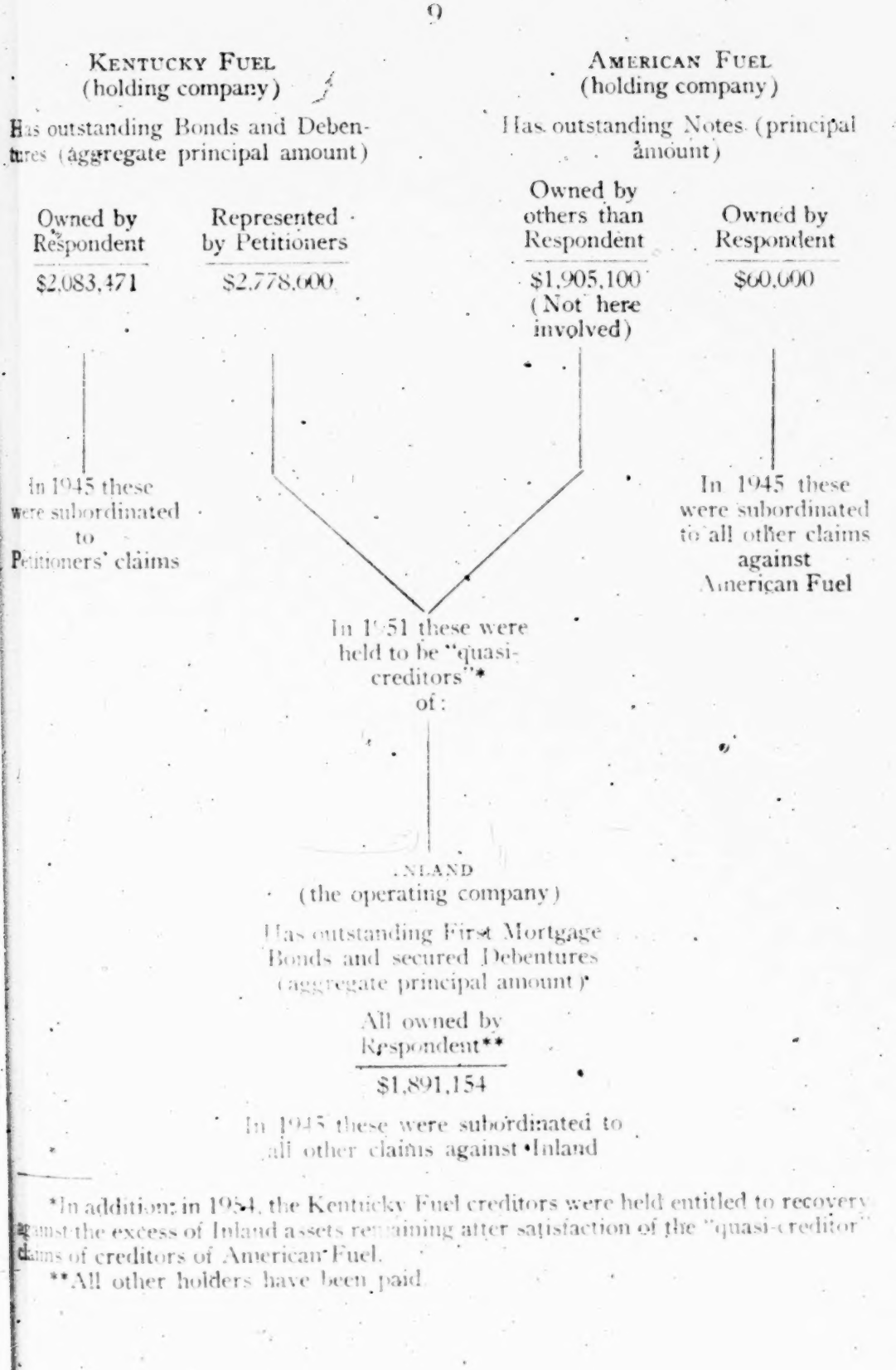
*See footnote *, p. 7, *supra*.



*In addition, in 1954, the Kentucky Fuel creditors were held entitled to recovery against the excess of Inland assets remaining after satisfaction of the "quasi-creditor" claims of creditors of American Fuel.

**All other holders have been paid.

Following the Court of Appeals' modification of its mandate in 1954 to give further equitable benefits to Petitioners, continued successful operations placed them in a position to receive, as "quasi-creditors" of Inland, payment of the full principal amount of their Kentucky Fuel Bonds and Debentures. After provision for such payment a surplus remained in the Inland estate.

(f) The Decision Below

The Trustee, in 1955, submitted a plan to the District Court which provided for the sale of all assets and application of the proceeds (i) to the payment of all principal on the Kentucky Fuel Bonds and Debentures, other than those of Respondent and (ii) to the payment of post-bankruptcy interest on those claims. This plan was submitted to the creditors for approval. Petitioner Kern actively opposed this plan and his adverse vote (since he had acquired 34% of the principal amount of outstanding Kentucky Fuel Bonds, see Section 216(7) of the Bankruptcy Act) was sufficient to defeat its acceptance by the affected creditors. The Trustee moved the District Court to confirm the plan despite this adverse vote (see Section 203 of the Bankruptcy Act). The District Court refused: one of the reasons for such refusal was that the plan provided for the award of post-bankruptcy interest on the claims of Petitioners (which were unsecured) prior to payment of the principal amount of the claims of Respondent, which the Court held was contrary to the decision of this Court in *New York* v. *Saper*, 336 U. S. 328 (1949).

In their appeal from that decision, the Kentucky Fuel Bonds and Debentures were, for the fourth time, requesting the equitable intercession of the Court of Appeals. Their request was, in effect, that the Court further alter its prior mandates so as to give to them—unsecured creditors of Kentucky Fuel whom the Court had previously made un-

secured "quasi-creditors" of Inland—post-bankruptcy interest prior to any payment on Respondent's secured claims against the Inland estate.

The Court of Appeals refused further to modify or reopen its prior mandates. It refused to order the District Court to depart, for the benefit of these Petitioners, from the well established rule that post-bankruptcy interest does not accrue on unsecured claims.

ARGUMENT

I. THE DECISION BELOW DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT ALREADY BEEN DECIDED BY THIS COURT.

A. The Question as to Post-Bankruptcy Interest.

None of the Petitions states, in its "Questions Presented", that it is questioning the general rule against post-bankruptcy interest or the well recognized and well defined exceptions to the rule. However, all the Petitions (in varying degrees) attack the general rule, as well as the District Court and the Court of Appeals for applying the rule in the instant case.

The existence of the general rule, and its well defined exceptions, must be the point of departure in determining whether the two Courts below were in error or abused their discretion in applying it here.

1. For more than 200 years it has been recognized as a "fundamental principle" that, subject to certain well defined exceptions, post-bankruptcy interest is not payable on claims in bankruptcy and receivership proceedings.

In 2 Blackstone, Commentaries *488, the rule is clearly stated:

> ". . . the usual rule is, that all interest on debts carrying interest shall cease from the time of issu-

> ing the [receiver's] commission, yet, in case of a surplus left after payment of *every debt*, such interest shall again revive, and be chargeable on the bankrupt, or his representatives."

This Court, per Justice Holmes in *Sexton* v. *Dreyfus*, 219 U. S. 339, 344 (1911), recognized and incorporated the early English rule into American bankruptcy jurisprudence:

> "For more than a century and a half the theory of the English bankruptcy system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. . . . [T]he rule was laid down not because of the words of the statute but *as a fundamental principle*. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another State. *No one doubts that interest on unsecured debts stops.*"

In 1949, this Court in *New York* v. *Saper*, 336 U. S. 328 (1949), a straight bankruptcy proceeding, reaffirmed the "fundamental principle" that interest on all claims *stops* at the date of bankruptcy and squarely held that an allowance for post-bankruptcy interest is not to be awarded on unsecured claims, even though such claims were entitled to a statutory priority, until principal was paid on all lower ranking claims. In the opinion of Justice Jackson, writing for the Court, the problem was stated thus:

> "The ultimate issue in these three cases is whether tax claims against a bankrupt bear interest until the date of bankruptcy, as held by the court below, or until payment, as previously held by another Court of Appeals." (336 U. S. at 329)

He then reviewed the history of the rule, stating:

> ". . . More than forty years ago Mr. Justice Holmes [in *Scarton v. Dreyfus*] wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. . . . Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary. . . . *No provision permits post-bankruptcy interest on other claims in general* or tax claims in particular. . . . Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the *'fundamental principle'* cuts off as of bankruptcy. . . . Tax claims are treated the same as other debts except for the fourth priority of payment, § 64(a), 11 U. S. C. § 104(a). . . ." (336 U. S. at 330-32)

The opinion is thus explicit that, because claims for taxes are treated the same as all other unsecured claims, they cannot, regardless of their statutory priority over other claims, be awarded an allowance for post-bankruptcy interest.

There are certain instances in which the rule against post-bankruptcy interest does not operate. This Court, in the *Saper* case, referred to two of these exceptions and has previously recognized the third:

(1) "[I]f the alleged 'bankrupt' proved solvent, creditors received post-bankruptcy interest before any surplus reverted to the debtor . . ." (336 U. S. at 330) (*accord, e.g., American Iron & Steel Co.* v. *Seaboard Airline Ry.*, 233 U. S. 261 (1914); *Johnson* v. *Norris*, 190 Fed. 459 (5th Cir. 1911)).

(2) "[I]f securities held by a creditor as collateral produced interest or dividends during bankruptcy such amounts were applied to post-bankruptcy inter-

est . . ." (336 U. S. at 330) (*accord, e.g., Sexton* v. *Dreyfus*, 219 U. S. 339 (1911); *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10 (9th Cir. 1951), *cert. denied*, 343 U. S. 953, 344 U. S. 886 (1952)).

(3) If the value of the pledged property is more than sufficient to pay principal, the excess value will be applied toward post-bankruptcy interest on a secured claim. *Vicmic Nat'l Bank* v. *Sprague*, 303 U. S. 406, (1938); *Coder* v. *Arts*, 213 U. S. 223, 245 (1909); (*accord, In re Macomb Trailer Coach, Inc.*, 200 F. 2d 611, 613 (6th Cir.), *cert. denied*, 345 U. S. 958 (1953)).

It is obvious that Petitioners' claims, which are unsecured claims against the insolvent Kentucky Fuel, do not fall within any exception to the "fundamental principle".*

Petitioners attack the general rule of law with respect to post-bankruptcy interest primarily on two grounds, *viz.*:

1. that the rule is applicable only to "straight" bankruptcy proceedings and not to corporate reorganizations under Chapter X; and

2. that *Saper*, being a tax case, announces a rule applicable only to other tax cases.

1. In asserting that this rule is a "bankruptcy rule", inapplicable in reorganization proceedings under Chapter

*Petitioner Kern attempts to indicate that a formidable dollar amount of securities is interested in the issue in these causes by printing a tabulation (footnote 20, p. 17 of his Petition) showing the annual volumes of new offerings of debt securities and the percentages of these which are unsecured notes and debentures. These figures are obviously irrelevant. The relative rights in reorganization proceedings between secured and unsecured debt are not in question here and both the total dollar figures and the percentages given are without pertinence.

X. Petitioners ignore the *per curiam* decisions rendered by this Court in 1952 shortly after *Saper* which apply the rule against post-bankruptcy interest with equal vigor to proceedings under Chapter X (*United States* v. *Edens*, 342 U. S. 912), Chapter XI (*United States* v. *General Engineering & Mfg. Co.*, 342 U. S. 912*), and in a general assignment for the benefit of creditors (*United States* v. *Bloom*, 342 U. S. 912).

2. In asserting that this rule is peculiarly applicable to claims for taxes, petitioners ignore (i) the rationale of *Saper* (assimilation of tax claims to other claims so far as concerns post-bankruptcy interest); (ii) the non-tax cases which have followed *Saper* (*e.g.*, *In re Macomb Trailer Coach, Inc.*, 200 F. 2d 611 (6th Cir.), *cert. denied*, 345 U. S. 958 (1953) (note recognition (200 F. 2d at 613) that *Saper* involved "tax claims *which are not secured obligations*"), *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10 (9th Cir. 1951), *cert. denied*, 343 U. S. 953, 344 U. S. 886 (1952)); and (iii) the innumerable non-tax cases decided prior to but in accord with *Saper*.**

Furthermore, that the *Saper* case (and subsequent decisions of this Court) dealt with claims for taxes—interest on which is typically by statute made a "part of the tax"***

*See also *National Foundry Co.* v. *Director of Internal Revenue*, 229 F. 2d 149 (2d Cir. 1956); *Second Line, Inc.* v. *Industrial Comm'r*, 212 F. 2d 865 (2d Cir.), *cert. denied*, 348 U. S. 830 (1954); *Massachusetts* v. *Thompson*, 190 F. 2d 10 (1st Cir. 1951), *cert. denied*, 342 U. S. 918 (1952).

**E.g., *Thomas* v. *Western Car Co.*, 149 U. S. 95 (1893); *Oppenheimer* v. *Oldham*, 178 F. 2d 386 (5th Cir. 1949); *Littleton* v. *Kincaid*, 179 F. 2d 848 (4th Cir. 1950); *Pacific States Corp.* v. *Hall*, 166 F. 2d 668 (9th Cir. 1948); *In re Gotham Can Co.*, 48 F. 2d 540 (2d Cir. 1931); *Samuels* v. *E. F. Drew & Co.*, 292 Fed. 734 (2d Cir. 1923); *New York Trust Co.* v. *Detroit, T. & I. Ry.*, 251 Fed. 514 (6th Cir. 1918); *Tredegar Co.* v. *Seaboard Air Line Ry.*, 183 Fed. 289 (4th Cir. 1910).

***See, *e.g.*, New York City Sales Tax, N. Y. C. Charter Administrative Code § N 41-17.0 (Supp. 1952) which was involved in the *Saper* case.

and which enjoy by statute priority over all claims except administrative and wage claims (§ 64a of the Bankruptcy Act)—seems, if anything, to enhance its force in the instant case.

2. The "fundamental principle" is not altered by the fact that there are differences in rank between unsecured claims *inter sese*.

Two or more classes of *unsecured* creditors, some having a preference or priority over others, is a common phenomenon. While *Saper* itself is a prime example, long before *Saper* the rule had many times been applied

> "... that claims entitled to priority do not bear interest for the period covered by the bankruptcy proceeding, unless the assets prove sufficient to pay the principal of all claims." Am. Jur. *Bankruptcy* § 537.*

This rule has been applied in State and Federal courts, whether the priority was contractual, equitable or statutory:

CONTRACTUAL PRIORITY: *Jamison* v. *Federal Deposit Insurance Corporation*, 149 F. 2d 199 (5th Cir. 1945). Debentures which expressly provided that they were subordinated to the payment "in full" of all other creditors, *held* entitled to payment after all unsecured creditors received principal of claims, *but not interest*. *Accord*, *United States* v. *Paddock*, 187 F. 2d 271 (5th Cir. 1951) (basis of priority was alternatively contract or constructive trust); *FDIC* v. *Dep't of Financial Inst.*, 113 Ind. App. 14, 44 N. E. 2d 992 (1942); *Atlanta Nat'l Bank* v. *Four States Grocer Co.*, 135 S. W. 1135 (Tex. Civ. App. 1911); *Att'y General* v. *Supreme Council A. L. H.*, 206 Mass. 131, 92 N. E. 134 (1910).

*To the same effect Glenn, Liquidation §§ 488, 510 (1943); Hanson, *Effect of Insolvency Proceedings on Creditor's Right to Interest*, 32 Mich. L. Rev. 1069, 1071-72 (1934); Note, 69 A. L. R. 1210 (1930).

EQUITABLE PRIORITY:

(i) Claims accorded priority because of superior equities—*Thomas* v. *Western Car Co.*, 149 U. S. 95 (1893). The priority given to six months' claims in equity receiverships is an equitable one; this Court denied post-bankruptcy interest on such claims since other claims could not be paid principal in full. *Accord*, *New York Trust Co.* v. *Detroit, T. & I. Ry.*, 251 Fed. 514 (6th Cir. 1918) (six months' claims); *Squire* v. *American Express Co.*, 131 Ohio State 239, 2 N. E. 2d 766 (1936) (constructive trust); *Farish* v. *Holley*, 244 Ala. 19, 12 So. 2d 88 (1943) (constructive trust).

(ii) Claims subordinated because of inequitable conduct of claimants—*Application of Progress Shoe Co.*, 107 F. Supp. 114 (E. D. N. Y. 1952). Stockholders of corporation in Chapter XI proceeding filed claims concededly required to be subordinated for equitable reasons—the court quoted and affirmed the Referee's opinion:

> ". . . [these claims] should be subordinated to the payment of 100% of the claims of general unsecured creditors *without interest* . . ." (107 F. Supp. at 116).

McGinnis v. *Corporation Funding & Finance Co.*, 8 F. 2d 532 (M. D. Pa. 1925). Creditors, who were directors of the insolvent corporation and whose claims had been subordinated for inequitable conduct, were entitled to payments of principal prior to the award of post-bankruptcy interest to the other creditors for whose benefit the subordination had been ordered.

STATUTORY PRIORITY: The cases are numerous. In addition to *Saper* and decisions following it, *e.g.*, *Missouri* v. *Earhart*, 111 F. 2d 992 (8th Cir. 1940); *In re Pacific Coast Building-Loan Ass'n*, 15 Cal. 2d 134, 99

P. 2d 251 (1940); *Fulton v. B. R. Baker-Toledo Co.*, 128 Ohio State 226, 190 N. E. 459 (1934); *Taylor v. Corning B. and T. Co.*, 185 Ark. 691, 48 S. W. 2d 1102 (1932); *Leach v. Sanborn State Bank*, 210 Iowa 613, 231 N. W. 497 (1930); *Cosmopolitan Trust Co. v. Suffolk Knitting Mills*, 247 Mass. 530, 143 N. E. 138 (1924); *United States F. and G. Co. v. Carnegie Trust Co.*, 161 App. Div. 429, 146 N. Y. Supp. 804 (1st Dep't), *aff'd*, 213 N. Y. 629, 107 N. E. 1087 (1914); *People v. American Loan and Trust Co.*, 172 N. Y. 371, 65 N. E. 200 (1902).

3. The decisions cited in the Petitions lend no support to Petitioners' contradiction of the above-stated rule of law and its application.

One of the principal cases relied on by the Petitions in their challenge of the rule of law applied below is *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 (1946), where this Court held that:

(i) "In determining ... how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits"; and "[w]hen and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law" (329 U. S. at 162-63); and

(ii) "The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings" and "interest on interest on secured claims must be disallowed (*id.* at 163).

In the course of these holdings, the Court stated that "[i]t is manifest that the touchstone of each decision on allowance

of interest in bankruptcy, receivership and reorganization has been a balance of equities . . ." *Id.* at 165).

That *Vanston* does not overrule all the prior decisions of this Court and lower courts with respect to post-bankruptcy interest (and in view of subsequent decisions such as *Saper* it would be untenable to suggest that *Vanston* accomplished such a result) has been recognized by the Court of Appeals for the Fifth Circuit in *Georgia, Florida & Alabama R. R. v. Bankers Trust Co.*, 170 F. 2d 733, 734 (5th Cir. 1948) which stated:

> "The *Vanston* case . . . does not in our opinion propound any new law in respect of interest accruing during receiverships and bankruptcies"

The Court of Appeals below, fully cognizant of the primary import of the *Vanston* case, commented:

> ". . . The actual ruling in the case was *a disallowance of interest* on interest on secured claims. . . ." (Vanston App. 22a)

This Court itself so applied *Vanston* (one week after that decision) in *Fleming v. Esplugen*, 329 U. S. 686 (1946), reversing, *per curiam*, the decision of the Seventh Circuit in *In re Chicago, R. I. & P. Ry.*, 155 F. 2d 889 (1946).

The remainder of the cases which the Petitions attempt to utilize in direct and indirect attacks on the general rule are briefly summarized (and it is obvious that they actually either support the rule or have no relevance to it):

American Iron & Steel Co. v. Seaboard Airline Ry., 233 U. S. 261 (1914), *held*, that interest is payable on secured claims where the debtor had returned to solvency; *See, cf.* (336 U. S. at 330) and the opinion of the Court of Appeals below recognized that these factors were the basis for that decision.

Consolidated Rock Products v. DuBois, 312 U. S. 510 (1941), *held*, that interest is payable on the de-

ficiency claim of a secured creditor prior to any distribution to common stockholders—an application of the "solvency" exception recognized in *Saper* (330 U. S. at 330).

Spring Coal Co. v. *Keech*, 239 Fed. 48 (4th Cir. 1916) and *Board of Comm'rs* v. *Bernardin*, 74 F. 2d 809 (10th Cir.), *cert. denied*, 295 U. S. 731 (1935), *held*, that post-bankruptcy interest was payable on tax claims because of their statutory priority; these cases were clearly overruled by *Saper*.

In re Deep Rock Oil Corp., 113 F. 2d 266 (10th Cir.), *cert. denied*, 311 U. S. 699 (1940), *held*, relying, *inter alia*, on *Spring Coal* and *Bernardin*, *supra*, that priority of principal determines priority of interest on unsecured claims.

Chicago R. I. & P. Ry. v. *Fleming*, 157 F. 2d 241 (7th Cir.), *cert. denied*, 329 U. S. 780 (1946), had no occasion to discuss (and did not discuss) the subject of post-bankruptcy interest since unsecured and deficiently secured creditors were not even receiving full payment of principal (the position of the Interstate Commerce Commission on this subject is set forth, *infra*, p. 22).

B. The Question as to Absolute Priority.

The Petitions assert that the application of the *Saper* rule to Petitioners' claims presents an important question of federal law in that it violates the absolute priority doctrine.*

Petitioners briefed and argued the absolute priority doctrine at length before the Court of Appeals but even the dissenting opinion of Judge Simons refused to recog-

*This assertion, of course, completely ignores that, on three separate occasions, Petitioners have benefited from an alteration of orthodox priorities; see Counterstatement, *supra*, pp. 3-4, 6-8.

nize it as relevant to this case. The clear holdings of this Court in *Saper* and subsequent cases should lay to rest any suggestion that absolute priority requires the award of post-bankruptcy interest on senior unsecured claims prior to the payment of junior unsecured claims.*

Despite their preoccupation with the absolute priority doctrine, Petitioners fail to refer to the case which squarely held *contra* to their contentions on this subject, *Massachusetts* v. *Thompson*, 190 F.2d 10 (1st Cir. 1951), *cert. denied*, 348 U. S. 918 (1952), and (save for Petitioner Kern) fail to mention another case which treated the relationship between the rule against post-bankruptcy interest and the absolute priority doctrine, *New York* v. *Feinberg*, 204 F. 2d 502 (2d Cir. 1953).

The majority in *Massachusetts* v. *Thompson*, an arrangement proceeding under Chapter XI which at that time embodied the "fair and equitable" standard,** rejected the argument of the dissenting judge that strict priority required the allowance of post-bankruptcy interest before the estate was returned to the debtor.*** *New York* v. *Feinberg* (a reorganization under Chapter X) rejected the contention of a senior unsecured (tax) claimant that the absolute priority doctrine required that the new securities to be issued to him bear the same rate of interest as his original claim and held that this doctrine only requires

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*See cases cited at p. 15, *supra*, where in proceedings under Chapter X and under Chapter XI (which at that time also incorporated the "fair and equitable" standard and thus the absolute priority doctrine) this and other Courts have applied the rule against post-bankrupt interest.

**It was nine months after that decision that the requirement that an arrangement be "fair and equitable" (see § 366 of the Bankruptcy Act) was eliminated from Chapter XI by the Act of July 7, 1952, c. 579, § 35, 66 Stat. 433.

***This Court denied certiorari, 342 U. S. 918 (1952) only two weeks after its *per curiam* decisions applying the *Saper* rule to proceedings under Chapter X, Chapter XI and compositions among creditors (see cases cited, page 15, *supra*).

recognition of priorities as of "the bar date of initiation of the proceedings" (204 F. 2d at 502-03), and hence did not affect the rules with respect to post-bankruptcy interest.*

For the sake of completeness, we shall comment in a footnote on certain of the authorities relied on by Petitioners in their attempts to create an absolute priority issue.**

C. The Question as to the Equitable Powers of a Court of Bankruptcy.

Petitioners assert that the decision below raises an important question of federal law insofar as it imposes a limitation of power on a bankruptcy court to adjust and determine

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*In addition, the Interstate Commerce Commission, in its administration of absolute priority under § 77 of the Act, has always taken the position that post-bankruptcy interest does not enter into the calculation in determining what is fair and equitable treatment upon reorganization; see *Florida East Coast Ry. Reorg.*, 282 I.C.C. 81, 178 (1951); *Wisconsin Cent. Ry. Reorg.*, 282 I.C.C. 393, 404 (1952).

**(i) *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510 (1941) (deficiency claims of bondholders are entitled to post-bankruptcy interest prior to a distribution to stockholders);

(ii) *Group of Institutional Investors v. Chicago, Milwaukee, etc. R. R.*, 318 U. S. 523, 573 (1943) ("no allowance should be made in the plan for interest on these [deficiently secured] bonds subsequent to the date of the filing of the petition.");

(iii) *Central States Electric Corp. v. Austrian*, 183 F. 2d 879 (4th Cir. 1950), *cert. denied*, 340 U. S. 917 (1951) and *In re Portland Electric Power Co.*, 162 F. 2d 618 (9th Cir.), *cert. denied*, 332 U. S. 837 (1947) (accumulated dividend arrearages on senior preferred stock paid prior to the participation of junior preferred stock; inasmuch as all claims had been paid, debtor was in fact solvent and the court applied corporate law rather than reorganization law);

(iv) *Eddy v. Prudence Bonds Corp.*, 165 F. 2d 157 (2d Cir. 1947), (senior lienors paid post-bankruptcy interest prior to junior lienors if income from or value of collateral sufficient to pay such interest—decided on basis of *Cider v. Arts* and *Ticonic Nat'l Bank v. Sprague* (discussed *supra* at p. 14), *i.e.*, "A pledgee acquires an interest in the pledge, which is not affected by the bankruptcy. . ." (165 F. 2d at 160))

the rights and priorities of parties based upon "flexible, equitable considerations."

To the contrary, the opinion of the Court (Judge Miller) on the post-bankruptcy interest issue clearly stated the Court's understanding as to its broad equitable powers:

> ". . . Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U. S. 215 and Pepper v. Litton, 308 U. S. 295, the Court had authority to disallow the claim of Columbia. Having declined to so do, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one." (Vanston App. 20a).

This is a plain statement by the Court (i) that it had power to disallow Respondent's claims entirely (thus increasing the participation of others) if equity required it, (ii) that (in the exercise of its equitable powers) it had again determined not to do so and (iii) the result of such determinations was Respondent's subordination to principal, but not to post-bankruptcy interest, of unsecured claims.

We submit that this is a construction, by the majority of the Court, of its prior mandates and a determination by it that, although the Court had equitable power again further to subordinate Respondent, it declined to do so (*i.e.*, reaffirmed its prior mandates).

Furthermore, it is inconceivable that the court below did not fully appreciate the scope and flexibility of its equitable powers sitting in bankruptcy when in these proceedings it has already exercised these equitable powers so as to accomplish

> (i) subordination of Respondent's secured claims against Inland to all other claims against Inland (like treatment was accorded Respondent's claims against Kentucky Fuel and American Fuel); 151 F. 2d 461 (1945);

(ii) on the "quasi-creditor" theory, elevation of the unsecured claims of the creditors of Kentucky Fuel to priority claims against 20% of the assets of Inland in further subordination of Respondent's secured claims against Inland (187 F. 2d 813 (1951));

(iii) by a modification of the "quasi-creditor" theory, further elevation of the unsecured claims of creditors of Kentucky Fuel to a priority position against the remainder of the assets of Inland in still further subordination of Respondent's secured claims against Inland (211 F. 2d 381 (1954)).*

Indeed, it is Petitioners who assert an "*in*flexible and *in*equitable rule. Petitioners have three times benefited from the exercise of the Court of Appeals' extraordinary equitable powers and now apparently assert that the failure of the Court to exercise such powers in their favor a fourth time constitutes error as a *matter of law*.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF THIS COURT IN *TAYLOR* v. *STANDARD GAS & ELECTRIC CO.* OR WITH THE DECISION OF THE TENTH CIRCUIT IN *IN RE DEEP ROCK OIL CORP.*

The Petitions assert that the decision below is in conflict with the decision of the Court of Appeals for the Tenth Circuit in In re *Deep Rock Oil Corp.*, 113 F. 2d 266, *cert. denied*, 311 U. S. 699 (1940) and that that decision was a construction of the mandate of this Court in *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307 (1939)—thus concluding that the decision below is in conflict with a decision of this Court.

*The panel which decided the case below was composed of the same three judges (Simons, Martin and Miller) which rendered the decisions in 208 F. 2d 13 (1953), 211 F. 2d 381 (1954), and 217 F. 2d 297 (1954); Judge Simons and Judge Martin, together with Judge Hicks, rendered the decisions in 151 F. 2d 461 (1945) and 187 F. 2d 813 (1951).

1. This Court's decision in *Taylor* in no way dealt with (or even mentioned) the matter of post-bankruptcy interest on the claims of the public creditors and only directed the Court of Appeals as follows:

> "... No plan ought to be approved which does not accord the preferred stockholders a right of participation in the equity in the Company's assets prior to that of Standard, and at least equal voice with Standard in the management." (308 U. S. at 324).

Reference to the opinion of the Tenth Circuit in *Deep Rock* dealing with the question of post-bankruptcy interest clearly establishes that that Court did not purport to construe the prior mandate of this Court.

Accordingly, the decision below presents no conflict with this Court's decision in *Taylor* v. *Standard Gas & Electric Co.*

2. Nor does the decision below present a conflict with the decision which the Court of Appeals for the Tenth Circuit rendered in the *Deep Rock* case after remand from this Court in *Taylor*.

It does not establish a conflict among Circuits to show that two Courts of Appeals affirmed District Court decisions which, in applying the equitable remedy of subordination to different sets of facts, arrived at results which do not fully coincide.

In *Deep Rock* the bankruptcy court subordinated the unsecured open account claims of Standard to Deep Rock's publicly held preferred stock and accumulated dividends and its publicly held unsecured notes and post-bankruptcy interest. The bankruptcy court below subordinated Respondent's claims against Inland to the principal of, but not post-bankruptcy interest on, the unsecured "quasi-creditor" claims of the holders of Kentucky Fuel Bonds and Debentures. Upon the respective appeals, the Tenth Circuit and the Sixth Circuit affirmed the District Courts.

Subordination of certain claims against a debtor to other claims over which they would normally have priority is an exercise by a court of bankruptcy of its equitable powers. The bankruptcy court applies those powers to the particular facts presented by a particular case, and such exercises of equitable power hardly create rules of law to bind subsequent bankruptcy courts in their application of those same powers to the different facts presented by a different case.

In any event, the decision of the Tenth Circuit in *Deep Rock* did not purport to apply any special rule of law made applicable to post-bankruptcy interest by reason of the equitable subordination of Standard's claims. In its opinion, the Tenth Circuit stated that it was affirming the District Court on the basis of its conception (clearly erroneous) of a general principle of law:

> "Where in the administration of the affairs of an insolvent corporation there are claims of different rank, the holders of prior claims are entitled to interest to the time of payment, even though the payment thereof may deprive the holders of subsequent claims of any participation in the funds of the bankrupt." (113 F. 2d at 269)

The decisions relied on by the Tenth Circuit in support of this statement do not support its conception of the general rule of law and two of these decisions were clearly overruled by this Court's decision in the *Saper* case. The Sixth Circuit in its opinion below pointed out the misconception of the general rule of law embodied in the *Deep Rock* decision:

> "In re Deep Rock Oil Corp., 10 Cir., 113 F. 2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U. S. 688, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.,

> supra, 233 U. S. 261, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling." (Vanston App. 23a)*

The decision of the Sixth Circuit does not establish a conflict with a decision of this Court or a conflict among the circuits—with respect to the law as to post-bankruptcy interest, the law as to the equitable powers of a bankruptcy court or the law as to absolute priority.

III. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN FAILING TO REVERSE THE ORDER OF THE DISTRICT COURT.

The Court of Appeals and the District Court (a) understood and correctly stated the rule of law concerning the payment of post-bankruptcy interest and (b) understood the breadth and completeness of the equitable powers of a bankruptcy court as stated by this Court in *Sampsell* v. *Imperial Paper & Color Corp.*** and *Pepper* v. *Litton.**** Thus, the decision below raises an issue only as to the propriety of the Court of Appeals' refusal further to exercise its equitable powers in response to Petitioners' request that the rule of law against post-bankruptcy interest not be applied in this case.

The basis of the Petitions is that the result reached by the District Court and affirmed by the Court of Appeals

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*The two tax cases referred to were *Board of Comm'rs* v. *Bercaw*, 74 F. 2d 800 (10th Cir. 1934) and *McFarland* v. *Hurley*, 280 Fed. 353 (5th Cir. 1923). The only two other cases relied on by the Tenth Circuit were *Central Trust Co.* v. *Condon*, 67 Fed. 84 (6th Cir. 1895), which dealt with secured claims (and, as in the *American Iron* case, with a corporation which actually proved solvent) and *Spring Coal Co.* v. *Veatch*, 239 Fed. 48 (4th Cir. 1916), which also dealt with secured claims.

**313 U. S. 215 (1941).

***308 U. S. 295 (1939).

necessarily is an inequitable one. Assuming that relative equities are decisive, this patently begs the question—did the Courts below properly *exercise* their equitable powers in refusing to reject Respondent's claims and classifying them as subordinate to principal but not post-bankruptcy interest on unsecured claims? The answer to this question necessarily involves factual considerations with which the District Court and the Court of Appeals are intimately familiar.

No one can purport to catalogue the equitable considerations which may have been weighed by the Courts below. Their knowledge of the equities was derived from many, many years of experience with these proceedings. District Judge Ford presided over the long trial in 1942 (see 1945 Rec. v. I-8) and at its conclusion made the detailed findings of fact which resulted in the initial subordination of Respondent's claims, and he has presided over all subsequent proceedings, those dealing with the day to day administration of the estates by the Trustee, and those dealing with the many successive plans for reorganization. The Court of Appeals on repeated occasions, upon successive appeals, studied and acted upon the pleas of one party and another for special equitable treatment.

Among the equitable considerations which the courts may properly have taken into account is the fact, so often raised in the proceedings before the District Court (and of which the Court of Appeals shows that it was well aware), that the real parties in interest to the Petitions are almost entirely "seasoned Wall Street speculators" who, upon receipt of the principal amounts of their claims alone, will reap very substantial gains.

For example, receipt of principal alone will yield Petitioner Kern on that part of his holdings of Kentucky Fuel Bonds which he purchased in the nine years 1944-1952, $31,798 for an investment of $83,676. For his Bonds purchased during 1953 and 1954, principal alone would

give him $320,866 for an investment of $290,568. Petitioner Kern's 1944 purchases were made at $6.30 per $100 principal amount. If he were allowed post-bankruptcy interest on them it would be at $6.50 per $100 of principal, an amount greater in each year that the proceedings continue than the entire amount he paid (certainly furnishing him no incentive to rapid termination of the proceedings). Another large holder of Kentucky Fuel Bonds has a cost basis of $37,000 for $440,000 principal amount thereof which, if post-bankruptcy interest were allowed, would accrue annual interest at the rate of $28,000.*

The specific cost figures in the record account for 54% of the Bonds and Debentures held by others than Respondent. Counsel for various parties below (including counsel for Petitioner Kern) have stated their belief that the overwhelmingly greater portion of all these securities are held by speculators, *e.g.*:

> "I also don't want to go unchallenged the hue and cry about ninety year-old ladies who are suffering because of the failure to get distribution. I have in my briefcase a letter from Mr. Harbison [American Fuel Trustee] dated back in September of 1954 in which he indicates to me that . . . there are outstanding in the hands of the original holders of American Fuel notes approximately 2% of the entire issue . . . which tends to support what I have said here so often, that all of these securities are in the hands generally of, not original investors, but of Wall Street — well inured, seasoned speculators." (T. July 14, 1955, p. 75*).

In response to an inquiry by the District Court as to whether any Kentucky Fuel Bonds or Debentures remained in the

*See Appendix of Ben Williamson, Jr., Trustee of Inland and Kentucky Fuel and Clinton M. Harbison, Trustee of American Fuel, pp. 105, 109 (filed in the Court of Appeals and certified to this Court in these causes).

hands of original purchasers thereof, counsel for Petitioner Kern has stated:

> "We did run on one, Your Honor. We found one gentleman in Pennsylvania. I don't know his name. I heard that he owned $1,200.00 of Bonds and, of course, Mr. Williamson's proofs of ownership would show. I think there probably are some, but very few and relatively small amounts." (T. March 8, 1956, p. 126.)

That these reorganization proceedings had provided a field day for speculators was first recognized by the Court of Appeals in 1953 (see 208 F. 2d 13, 14-15) and the history of petitioner Kern's role in these proceedings was again adverted to in its introductory statement to its opinion below:

> ". . . Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid." (Vanston App. 8a-9a.)

CONCLUSION

The Petitions for Writs of Certiorari (Nos. 325, 336 and 342) to the decision of the Court of Appeals of the Sixth Circuit should be denied.

Respectfully submitted,

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September 9, 1957

NO.

336

Office Supreme Court, U.S.
FILED
AUG 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 336

IN THE MATTER
of
INLAND GAS CORPORATION,
Debtor,

IN THE MATTER
of
KENTUCKY FUEL GAS CORPORATION,
Debtor,

IN THE MATTER
of
AMERICAN FUEL & POWER COMPANY,
et al.,
Debtors.

In Bankruptcy

Committee for Holders of KENTUCKY FUEL GAS CORPORATION 6½% Debentures,
Petitioner,

versus

THE COLUMBIA GAS SYSTEM, INC., and BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and of KENTUCKY FUEL GAS CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Dated July 31, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

IN THE MATTER *of* INLAND GAS CORPORATION, Debtor,	In Bankruptcy
IN THE MATTER *of* KENTUCKY FUEL GAS CORPORATION, Debtor,	
IN THE MATTER *of* AMERICAN FUEL & POWER COMPANY, *et al.*, Debtors.	
COMMITTEE FOR HOLDERS OF KENTUCKY FUEL GAS CORPORATION 6½% DEBENTURES, Petitioner, *versus* THE COLUMBIA GAS SYSTEM, INC., and BEN WILLIAMSON, JR., as Trustee of Inland Gas Corporation and of Kentucky Fuel Gas Corporation, Respondents.	

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Sixth Circuit, entered in the above-entitled case on February 14, 1957.

Citation to Opinion Below.

The District Court did not render a written opinion but its findings are contained in an order filed on March 14, 1956 printed in Appendix B hereto, *infra*, p. 16. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 19, is reported at 241 F. 2d 374.

Jurisdiction.

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 14, 1957 (see Appendix B, *infra*, p. 38). A timely petition for rehearing filed on March 5, 1957 was denied on May 8, 1957 (see Appendix B, *infra*, p. 39). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 and 11 U. S. C. Section 47(c).

Question Presented.

Must the reorganization court reject a plan of reorganization under Chapter X of the Bankruptcy Act because it recognizes post-bankruptcy interest on unsecured claims ahead of the claims of a wrongdoing parent-creditor whose claims have been ordered fully subordinated to all other creditors because of the illegal and inequitable conduct of such subordinated creditor which caused the bankruptcy of the debtor.

Statutes Involved.

The pertinent provisions of the Bankruptcy Act are set forth in Appendix A hereto, *infra*.

Statement.

This case arises out of the proceedings in reorganization under Chapter X of the Bankruptcy Act of the Inland Gas Corporation ("Inland"), Kentucky Fuel Gas Corporation ("Kentucky") and American Fuel & Power Company ("American"). The jurisdiction of the District Court was invoked because the case arises under the Bankruptcy Act. Petitioners have represented the interests of the holders of the Kentucky Debentures in these proceedings continuously since the commencement of the proceeding herein in 1930.

The past history of these proceedings and of these debtors are detailed in the numerous opinions of the Court of Appeals for the Sixth Circuit and of this Court.* In summary, Inland and Kentucky were organized in 1927 and 1928, respectively, for the purpose of producing, transporting and selling natural gas to industrial consumers, and American was organized in 1928 for the primary purpose of acquiring the stock of Inland and Kentucky. Receivership proceedings leading to these Chapter X proceedings were caused by the respondent Columbia Gas & Electric Corporation (since renamed The Columbia Gas System,

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* *In re American Fuel & Power Co.*, 122 F. 2d 223 (1941); *Columbia Gas & Electric Corp.* v. *United States*, 151 F. 2d 461 (1945), modification denied, 153 F. 2d 101, certiorari denied, 329 U. S. 737 (1946); *In re American Fuel & Power Co.*, 151 F. 2d 470 (1945), affirmed sub nom. *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156 (1946); *In re Inland Gas Corp.*, 187 F. 2d 813 (1951); *In re Inland Gas Corp.*, 208 F. 2d 13 (1953); *In re Inland Gas Corp.*, 211 F. 2d 381 (1954), certiorari denied, 348 U. S. 840 (1954); *In re Inland Gas Corp.*, 217 F. 2d 207 (1954).

Inc., and sometimes referred to herein as "Columbia"),* which had acquired a majority of the stock of American and a substantial amount of the securities of the other debtors, in order to prevent competition with Columbia's activities. In *In re American Fuel & Power Co.*, 122 F. 2d 223 (1941), the Court of Appeals for the Sixth Circuit found that the actions of Columbia in acquiring controlling securities of the debtors were illegal and in violation of Section 7 of the Clayton Act and other antitrust laws. In that decision the court held that since Columbia had conceived a scheme to wreck the interests of the debtors the court should not lend its aid to further a scheme abhorrent to all recognized rules of right and justice, and the court ordered that "all claims or stock interest of the Columbia in the debtors', title to which it acquired in violation of Section 7 of the Clayton Act . . . be rejected and the Columbia take nothing thereby." 122 F. 2d at 229. In later proceedings, to which Columbia was a party, the Sixth Circuit modified the treatment of the claims of Columbia by decreeing that "The decree will be limited in remedy to the subordination of the Columbia claims to the claims of all other creditors of every class, and as so amended, the judgment is affirmed." *Columbia Gas & Electric Corp.* v. *United States*, 151 F. 2d 461, 470 (1945), certiorari denied, 329 U. S. 737 (1946). Petitions for amendment and clarification of the court's mandate were denied, *Columbia Gas & Electric Corporation* v. *United States*, 153 F. 2d 101 (1946). The court's decree was clarified, however, in *In re Inland Gas Corp.*, 187 F.

* District Court Findings, Allen App. p. 1-A *et seq.* The record herein, as in other petitions already filed in this case, consists of copies of all the appendices filed by all parties below, together with all proceedings in the court below, duly certified, which have been filed as permitted by paragraph 3 of Rule 21 of the Rules of this Court. Citations herein are to the several appendices filed below, identified by reference to the party filing same.

2d 813 (1951), where the court made it clear that all claims of Columbia were subordinated to the claims of all other public creditors of all three debtors.

Accordingly, the Trustee prepared a plan in which the claims of Columbia were fully subordinated to the claims (both as to principal and interest) of the creditors of all three debtors. That plan ("Trustee's Plan of Reorganization dated February 12, 1953, as Further Amended September 23, 1955, and as Finally Amended", hereinafter sometimes referred to as the "Trustee's Plan") was presented for confirmation at hearings before the District Judge on March 8, 1956, following which the order now under review was entered by the District Court on March 14, 1956 (see Appendix B, *infra*, p. 16). By that order the District Court refused confirmation of the Trustee's Plan on the ground that such plan erroneously recognized post-bankruptcy interest on Kentucky's publicly held unsecured obligations, and directed the Trustee to file a new Plan which would deny post-bankruptcy interest to the public creditors of Kentucky, despite the fact that the beneficiary who will receive the funds released by the denial of interest on the claims of the public creditors of Kentucky is Columbia, which had previously been subordinated to those very claims because of its unconscionable conduct in wrecking these debtors. The order of the District Court was affirmed by a divided vote of the Court of Appeals for the Sixth Circuit on February 14, 1957, Chief Judge Simon, whose opinion represented the views of the court on other questions involved, being of the opinion that the public creditors of the debtors should be paid in full before the wrongdoer Columbia participates. Judges Martin and Miller felt that post-bankruptcy interest should not be allowed on the claims of the public creditors of the debtor despite the resulting benefit to the wrongdoer Columbia, in view of this

Court's decision in *City of New York* v. *Saper*, 336 U. S. 328 (1949), a case involving the payment of post-bankruptcy interest on claims for taxes.

Reasons for Granting the Writ.

1. Conflict with another Court of Appeals.

The decision of the court below that post-bankruptcy interest on unsecured claims may not be permitted irrespective of the equitable considerations involved is directly in conflict with the decision of the Court of Appeals for the Tenth Circuit in *In re Deep Rock Oil Corp.*, 113 F. 2d 266, certiorari denied, 311 U. S. 699 (1940). In that case, the Court of Appeals for the Tenth Circuit held that there could be no participation in the assets of the debtor by a subordinated creditor until there has been payment in full of principal and interest on the claims of the classes intended to benefit by the subordination. In that case, as in the instant case, a wrongdoer was ordered subordinated to the claims of other persons injured as a result of its unlawful and unconscionable conduct; yet, whereas in *Deep Rock* the court held that post-bankruptcy interest must be paid on such claims, the court below in the instant case has held that, irrespective of the inequitable and unconscionable conduct of the subordinated creditor, post-bankruptcy interest may not be paid on account of claims intended to benefit by the subordination. This conflict with the Tenth Circuit decision is clear, for in the court below in the instant case, Judge Miller, for the majority on this issue, has said (241 F. 2d, at 382):

> "Appellants in effect urge * * * that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made

to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention * * *."

Moreover, *In re Deep Rock Oil Corp., supra,* was decided pursuant to a mandate of this Court, *Taylor* v. *Standard Gas Co.*, 306 U. S. 307 (1939), that no plan of reorganization may be approved which does not subordinate to the rights of preferred shareholders the claims of a parent company whose mismanagement and loose dealing contributed to the bankruptcy of the debtor. Consequently, and in view of the fact that in the latter case no objection was raised to that part of the plan of reorganization which provided for payment of post-bankruptcy interest on the claims of the holders of unsecured debentures of *Deep Rock*, it would seem that the instant decision in the Sixth Circuit herein is also contrary to the decision of this Court in *Taylor* v. *Standard Gas Co., supra.*

2. Case Presents Important Question of Federal Law: Conflicts With Prior Decisions of this Court.

The question presented herein is believed to be an important question of federal law which has not been, but should be, directly decided by this Court. As noted above, *Taylor* v. *Standard Gas Co., supra,* has considered the question implicitly, but the question of post-bankruptcy interest on unsecured claims in bankruptcy reorganization proceedings has not been definitely and directly settled by this Court.

The majority of the court below felt that this important question was laid to rest by this Court in *City of New York* v. *Saper, supra,* which involved the question of whether tax claims are entitled to post-bankruptcy interest in a straight liquidating bankruptcy proceedings, and was largely concerned with the effect on such claims of certain amendments to the Bankruptcy Act adopted in 1926 and 1938. In that case Mr. Justice Jackson said (336 U. S at 329): "The ultimate issue . . . is whether tax claims against a bankrupt bear interest until the date of bankruptcy, . . . or until payment, . . ." In noting (p. 329, n. 5) that the question was of considerable practical importance in the administration of the Bankruptcy Act he stated that those most immediately concerned with the administration of the Bankruptcy Act have frequently expressed dissatisfaction over the inroads taxes and interest thereon made in the fund available for creditors. The *Saper* case did not purport to settle the question of post-bankruptcy interest on unsecured claims as against an equitably subordinated claim; rather it held that in straight bankruptcy, interest on tax claims is not entitled to the same priority as the tax claim itself and that such interest should be treated the same as interest on other unsecured claims, and, on familiar principles it then properly denied such interest on the basis of the facts presented therein.

In assimilating taxes to other debts, and in providing for the same treatment for interest on taxes as on other debts, the *Saper* case did not adopt or change any rules governing interest on unsecured claims. It sought to apply those rules to the case then at hand and declined to create a special exception to those rules in favor of tax claims.

The rules governing the recognition of post-bankruptcy interest which the *Saper* case sought to apply must be

found in the many decisions of this and other courts which have dealt with the various aspects of the rule and the exceptions thereto. Reference to such decisions demonstrates that the bankruptcy court has the power to recognize post-bankruptcy interest on unsecured claims of higher rank than the next lower class of claim, whether the difference in rank arises on a contractual basis, from an equitable subordination, or otherwise, Cf. *In re Deep Rock Corp., supra; American Iron & Steel Manufacturing Co.* v. *Seaboard Air Line Ry Co.*, 233 U. S. 261 (1914); *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510 (1941); *Spring Coal Co.* v. *Keech*, 239 Fed. 48 (4th Cir. 1916); *Board of Commissioners* v. *Bernardin*, 74 F. 2d 809 (10th Cir. 1934), certiorari denied, 295 U. S. 731 (1934). The *Saper* case neither imposes, nor does it imply, any limitation on the power of the bankruptcy court either to create a difference in "relative dignity" by a decree of equitable subordination, or to control to the outer limit, including recognition of post-bankruptcy interest, the impact of its remedy, as fairness and equity require.

The *Saper* case does not consider or deal with the basic question of whether the District Court, sitting in a corporate reorganization proceeding under Chapter X of the Bankruptcy Act and in the exercise of its traditional function as a court of equity, has the power to order the recognition of post-bankruptcy interest in priority to the recognition of subordinated claims. This question is one which is of considerable practical importance in implementing the equitable powers of the reorganization court and in the sound and orderly administration of the Bankruptcy Act, and its determination by this Court would be in the public interest.

3. Decision of Court Below Erroneous.

The decision of the court below is, we submit, erroneous and the conflicting decision of the Court of Appeals for the Tenth Circuit in *In re Deep Rock Oil Corp., supra,* is correct.* Moreover, the decision of the court below is inconsistent with and casts doubt upon numerous prior decisions of this Court dealing with the power of the courts, sitting in bankruptcy, to adjust and determine the rights and priorities of parties based upon flexible equitable considerations, e.g., *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156 (1946), *Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215 (1941), and violates the fixed principle of "absolute priority" in corporate reorganizations, *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482 (1913), *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 (1941).

It is submitted that the court below committed error in deciding that the instant case is governed by *City of New York* v. *Saper, supra,* since such a result is not required by *Saper*. Although the court below noted (241 F. 2d at 383) that *In re Deep Rock Oil Corp., supra,* is contrary to its decision, it chose to disregard it by purporting to distinguish several cases which were cited by the Tenth Circuit in the *Deep Rock* opinion. The lower court, however, made no attempt to distinguish or explain its plain conflict with the holding and result of *In re Deep Rock Oil Corp., supra*, despite the fact that it is a landmark case which has been cited with approval on numerous occasions since this Court's decision in *Saper*.*

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* *In re Macomb Trailer Coach*, 200 F. 2d 611, 613 (6th Cir. 1952); certiorari denied, 345 U. S. 958 (1953); *Bondholders, Inc.* v. *Powell*, 190 F. 2d 74, 81 (4th Cir. 1951), certiorari denied, 342 U. S. 921 (1952); *Chase* v. *Austrian*, 189 F. 2d 555, 557 (4th Cir. 1951), certiorari denied, 340 U. S. 917 (1951); *Central States Electric Corp.* v. *Austrian*, 183 F. 2d 879, 886 (4th Cir. 1950) certiorari denied, 340 U. S. 917 (1951).

In corporate reorganization cases, the obvious effect of the subordination of the claims of a wrongdoing insider to the claims of public creditors is, and should be, to place the claims of the public creditors in a separate and distinct prior class from those of the subordinated party. Since interest cannot be separated from the principal to which it relates, the total claim represents one debt of uniform rank and dignity, *American Iron & Steel Manufacturing Co.* v. *Seaboard Air Line Ry. Co.*, 233 U. S. 261 (1914). Thus, the rule of absolute priority in corporate reorganization would seem to require the payment of interest on claims of a higher rank and dignity before the claims of a junior subordinated class may receive any recognition. *Cf. Case* v. *Los Angeles Lumber Products Co., supra, Northern Pacific Ry. Co.* v. *Boyd, supra, Consolidated Rock Products Co.* v. *Du Bois, supra.*

The situation is not unlike any case involving claims of different rank and priority in which the entire claim of one class which is entitled to priority (including interest) must be paid in full before the next lower class may participate in the assets of the estate, see *American Iron & Steel Manufacturing Co.* v. *Seaboard Air Line Ry. Co., supra,* Cf. *Johnson* v. *Norris*, 190 Fed. 459 (5th Cir. 1911), certiorari denied 232 U. S. 723 (1914), see Johnson, *Bankruptcy Reorganization*, §519 (1936). All that *City of New York* v. *Saper, supra,* and the line of cases following it*

* The cases of *U. S.* v. *Edens*, 189 F. 2d 876 (4th Cir. 1951), aff'd without opinion 342 U. S. 912 (1952), *U. S.* v. *General Engineering & Mfg. Co.*, 188 F. 2d 80 (8th Cir. 1951), aff'd without opinion 342 U. S. 912 (1952), *Sword Line, Inc.* v. *Industrial Commissioner of State of New York*, 212 F. 2d 865 (2nd Cir. 1954) certiorari denied 348 U. S. 830 (1954), *In re Huyler's*, 107 F. Supp. 318 (S. D. N. Y. 1952), *State of New York* v. *Feinberg*, 204 F. 2d 502 (2nd Cir. 1953) which followed the *Saper* case, all involved tax claims and are likewise inapposite on their facts to this proceeding.

does is to alter this rule with respect to the interest on tax claims by denying interest on tax claims the same rank and dignity as the tax itself.

The decision in the present case raises serious questions as to the extent to which the courts may subordinate claims on equitable grounds and introduces a rigid, inflexible and unyielding rule into the law dealing with the equitable treatment of claims by the reorganization court, in place of the traditional flexibility of such courts. This change constitutes a grave threat to the just and orderly administration of the Bankruptcy Act.

4. The Lower Court Decision Produces Inequitable and Inconsistent Results.

The decision of the court below has resulted in a situation where the wrongdoer directly responsible for the bankruptcy of the debtors is permitted to recover payments on account of its claims before the payment in full of the claims of those creditors who were directly and grievously injured by the wrongdoer's conduct. This alone should bring reversal, but the decision below also produces another anomalous result in that although the public creditors of Kentucky are now denied all of the twenty-six years' post-bankruptcy interest on their claims, other public creditors of the debtors herein whose claims are in fact unsecured have been, and will yet be, paid post-bankruptcy interest on their claims. The Trustee's Plan (Art. VI, Sec. 6) makes provision for the payment of interest on the 7% Gold Notes of American. These Notes of American are unsecured except that they have the benefit of a pledge of certain shares of the common stock of Inland. Since the common stock of Inland is found worthless under the Trustee's Plan and no distributions have been made on it during bankruptcy it would appear that the American Notes

are, in actual fact, secured by nothing and for all practical purposes are unsecured. Nevertheless, the District Court has ordered payments made on account of post-bankruptcy accrued interest on the American Notes (Order Dist. Ct. November 25, 1952) and has raised no objection to those provisions of the Trustee's Plan (Art. VI, Sec. 6) which provide for the payment of additional post-bankruptcy interest on the American Notes. Such a result produces a confusing anomaly in dealing with the question of post-bankruptcy interest on unsecured claims and presents an additional reason for review.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD J. GALLAGHER,
WALTER H. BROWN, JR.,
JOHN L. SMITH,
KENNETH J. BIALKIN,
Counsel for Petitioner.

Dated: July 31, 1957.

APPENDIX A

Statutes.

The pertinent provisions of the Bankruptcy Act, 52 Stat. 840 (1938), 11 U. S. C. 1 *et seq.* (1952), are as follows:

Section 57n, 11 U. S. C. §93n: Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: * * *

Section 63a (1), 11 U. S. C. §103a (1): Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date * * *

Section 102, 11 U. S. C. §502: The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive * * *

Section 106, 11 U. S. C. §506: For the purposes of this chapter, unless inconsistent with the context—

(1) "claims" shall include all claims of whatever character against a debtor or its property, except stock, whether or not such claims are provable under section 63

of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent;

* * *

(4) "creditors" shall mean the holder of any claim; * * *

* * *

Section 196, 11 U. S. C. §596: After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court.

Section 216, 11 U. S. C. §616: A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

(2) may deal with all or any part of the property of the debtor; * * *

* * *

(5) shall specify what claims, if any, are to be paid in cash in full; * * *

Section 221, 11 U. S. C. §621: The judge shall confirm a plan if satisfied that—

* * *

(2) The plan is fair and equitable, and feasible; * * *

APPENDIX B

Order of H. Church Ford, U. S. D. C. J., Dated March 14, 1956, From Which Appeal Was Taken to United States Court of Appeals for the Sixth Circuit

This cause came on for hearing on March 8, 1956, at Lexington, in said district, pursuant to notice duly given as provided by law.

Thereupon the Court proceeded to consider the petition of Clinton M. Harbison, Trustee of American Fuel & Power Company, praying that the Court confirm the "Amended Plan of Reorganization dated February 12, 1953, as further amended September 23, 1955, and as finally amended", under the provisions of Sections 179 and 216(7) of the Bankruptcy Act, regardless of the fact that two-thirds in amount of the public holders of Kentucky Fuel Gas Corporation bonds have not accepted said plan. And the Court heard testimony offered in support of the confirmation of said plan and also heard argument of counsel in favor of the confirmation of said plan, by counsel for said Clinton M. Harbison, Trustee as aforesaid, and by counsel for Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, and by counsel for various interested creditors herein, and also heard argument of counsel for Paul E. Kern and counsel for certain American Fuel & Power Company stockholders in opposition to the confirmation of said plan. The Court also heard a statement by counsel for the Securities Exchange Commission to the effect that further consideration of the confirmation of said plan should await a determination of the federal income tax question raised by petition filed herein by Ben Williamson, Jr., Trustee as aforesaid, and hereinafter mentioned.

Without making any decision upon said petition of Clinton M. Harbison, Trustee as aforesaid, the Court called up for consideration the petition filed herein by said Ben Williamson, Jr., Trustee as aforesaid, for an adjudication that no federal income tax liability will be incurred by the estates of the Debtors by reason of the sale of certain assets as provided in said Plan, and for injunctive relief. There-

upon came Henry J. Cook, United States Attorney, and C. S. Titus, special counsel, and appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for the District of Kentucky, and filed a motion to dismiss said petition of Ben Williamson, Jr., Trustee, for want of jurisdiction. After hearing argument of counsel on said motion, the Court was of opinion that said petition is in effect an application for a declaratory judgment and under the provisions of the Federal Declaratory Judgment Act this Court is without jurisdiction to entertain the petition. Whereupon it is ORDERED that said motion be and the same is hereby sustained and said petition of Ben Williamson, Jr., Trustee as aforesaid, is hereby dismissed.

The Court then proceeded to consider further the above mentioned petition of Clinton M. Harbison, Trustee as aforesaid, to confirm said plan. And thereupon the Court announced from the bench that he was of opinion that the public holders of bonds and debentures of Kentucky Fuel Gas Corporation, being unsecured creditors, are not entitled to post-bankruptcy interest on their claims and that said plan is erroneous in allowing such post-bankruptcy interest, and for that reason, and for the further reason that the Court lacks jurisdiction and hence cannot pass upon the tax question presented by said petition of Ben Williamson, Jr., Trustee as aforesaid, and because of the uncertainty resulting from such undetermined tax question, the Court was of opinion that the plan should not be confirmed. Whereupon it is ORDERED that said petition of Clinton M. Harbison, Trustee as aforesaid, be and the same is hereby dismissed and confirmation of said plan is denied.

The Court then proceeded to consider the proposed plan of reorganization offered by Paul E. Kern, and dated July 7, 1955, and the Court was of opinion that said Kern plan is not worthy of consideration for the reason that it proposes to encumber the reorganized corporation with a heavy indebtedness, and for other reasons stated from the bench. Whereupon it is ORDERED that said Kern Plan

be and it is hereby adjudged not worthy of consideration within the meaning of Chapter X of the Bankruptcy Act.

The Court then directed the Trustees herein to prepare and file a new Plan of Reorganization which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation.

Robert S. Spilman, Jr., counsel for certain stockholders of American Fuel & Power Company then moved the Court to require Ben Williamson, Jr., Trustee as aforesaid, to mail to him certain statements with respect to the business, and operations of Inland Gas Corporation. Whereupon it is ORDERED that said Trustee shall forthwith furnish to said counsel copies of monthly reports gotten out by said Trustee for the year 1955, and hereafter furnish to said counsel copies of all reports with respect to Inland Gas Corporation and its business and operations which are furnished by said Trustee to other counsel of record in this proceeding.

March 14, 1956.

Enter,

(s) H. CHURCH FORD,
Judge.

Opinion of United States Court of Appeals for the Sixth Circuit, Dated February 14, 1957

In re INLAND GAS CORPORATION, Debtor.
In re KENTUCKY FUEL GAS CORPORATION, Debtor.
In re AMERICAN FUEL & POWER COMPANY et al., Debtor.

Nos. 12864-12867.

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge.

After more than twenty-six years of Receiver and Trustee operation of the Debtors' properties, of litigation delaying reorganization under Chapter X of the Bankruptcy Act, 11 U. S. C. A. §501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas & Electric Corporation *v.* United States, 6 Cir., 151 F. 2d 461, modification denied, 6 Cir., 153 F. 2d 101, certiorari denied 329 U. S. 737, 67 S. Ct. 48, 91 L. Ed. 636; In re Inland Gas Corporation, 6 Cir., 187 F. 2d 813; In re Inland Gas Corporation, 6 Cir., 208 F. 2d 13; In re Inland Gas Corporation, 6 Cir., 211 F. 2d 381, certiorari denied Kern *v.* Williamson, 348 U. S. 840, 75 S. Ct. 45, 99 L. Ed. 662; In re Inland Gas

Corporation, 6 Cir., 217 F. 2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930, by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan entitled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable and feasible, by the District Court in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Court circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modifications. The important new developments consisted of a substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so, the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland, or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the Internal Revenue Code of 1954, 26 U. S. C. A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from

the Tennessee Gas Transmission Company which offered $8,000,000.00 in cash for the same properties which it confirmed by a deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation for the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purposes of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decision is correct, the Federal tax involved would be approximately $1,192,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these rulings and as an assumed result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation

were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U. S. C. A. §§2201, 2202, it was without jurisdiction to entertain it. Whereupon, it ordered that the petition of the Trustee be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors, were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganized corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as evidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of §337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and within the twelve months' period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unnecessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commis-

sioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed," so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in a Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for a successful and prompt reorganization by the $8,000,000.00 offer received by Tennessee. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and the release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been

no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the petitions, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201, Tit. 28 U. S. C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421 of the Internal Revenue Code of 1954, 26 U. S. C. A., § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C. F. R. § 1.337-2(b). The problem with which § 337 was concerned arose out of the decisions in Commissioner *v.* Court Holding Co., 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981, and United States *v.* Cumberland Public Service Co., 338 U. S. 451, 70 S. Ct. 280, 94 L. Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies

and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of §337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in §7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re American Fuel & Power Co., 6 Cir., 151 F. 2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F. 2d 813, 819, we said: "The order will be amended by a section to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered to those rulings. 217 F. 2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the

provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule (1) If the alleged bankrupt proves solvent, post-bankruptcy interest is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bankruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period a difference of opinion as to allowance of interest on tax claims. They were considered in some jurisdictions as claims of higher dignity than general claims. This difference has now been resolved by the City of New York *v.* Saper, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the light of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky credi-

tors who have waited so long for the payment of their claims. "It is manifest," said Mr. Justice Black, for the majority, in Vanston Bondholders Protective Committee *v.* Green, 329 U. S. 156, 67 S. Ct. 237, 241, 91 L. Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell *v.* Imperial Paper & Color Corporation, 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F. 2d 266, certiorari denied, Standard Gas & Electric Co. *v.* Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, and its predecessor, Taylor *v.* Standard Gas & Electric Co., 306 U. S. 307, 618, 59 S. Ct. 543, 83 L. Ed. 669, that, as said in Sampsell, 313 U. S. at page 219, 61 S. Ct. at page 907, "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further observation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F. 2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation, for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan of reorganization, which may or may not contain a provision for sale of the properties, or which may or may not submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems here involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted, we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debentures ask us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer thinks it sufficient, therefore,

to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12865, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, *Circuit Judge.*

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee *v.* Green, 329 U. S. 156, 163, 67 S. Ct. 237, 91 L. Ed. 162; Sexton *v.* Dreyfus, 219 U. S. 339, 344, 31 S. Ct.

256, 55 L. Ed. 244; City of New York *v.* Saper, 336 U. S. 328, 330-331, 69 S. Ct. 554, 93 L. Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. *v.* Seaboard Air Line Ry., 233 U. S. 261, 267, 34 S. Ct. 502, 58 L. Ed. 949; City of New York *v.* Saper, *supra*, 336 U. S. 328, at page 330, 69 S. Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principal of the debt secured, the excess should be applied to post-bankruptcy interest on the obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F. 2d 611, 613, certiorari denied McInnis *v.* Weeks, 345 U. S. 958, 73 S. Ct. 940, 97 L. Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell *v.* Imperial Paper & Color Corp., 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 and Pepper *v.* Litton, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281, the Court had authority to disallow the

claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison *v.* Federal Deposit Insurance Corp., 5 Cir., 149 F. 2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On the contrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York *v.* Saper, *supra*, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 719. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U. S. C. A. The Court said 336 U. S. at page 337, 69 S. Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§64, sub. a, and 57, sub. n [11 U. S. C. A. §93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X, United States *v.* Edens, 4 Cir., 189 F. 2d 876, affirmed 342 U. S. 912, 72 S. Ct. 357, 96 L. Ed. 682. See also: United States *v.* General Engineering & Mfg. Co., 8 Cir., 188 F. 2d

80, affirmed 342 U. S. 912, 72 S. Ct. 358, 96 L. Ed. 682; Pavone Textile Corp. *v.* Bloom, 302 N. Y. 206, 97 N. E. 2d 755, affirmed sub nom., United States *v.* Bloom, 342 U. S. 912, 72 S. Ct. 357, 96 L. Ed. 682; Commonwealth of Massachusetts *v.* Thompson, 1 Cir., 190 F. 2d 10, certiorari denied 342 U. S. 918, 72 S. Ct. 364, 96 L. Ed. 686; Sword Line *v.* Industrial Commissioner, 2 Cir., 212 F. 2d 865, certiorari denied 348 U. S. 839, 75 S. Ct. 53, 99 L. Ed. 654; National Foundry Co. of New York *v.* Director of Internal Revenue, 2 Cir., 229 F. 2d 149. The exception was not recognized by this Court in New York Trust Co. *v.* Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison *v.* Federal Deposit Insurance Corp., *supra*, 5 Cir., 149 F. 2d 199; United States *v.* Paddock, 5 Cir., 187 F. 2d 271, 276; Application of Progress Shoe Co., D. C. E. D. N. Y., 107 F. Supp. 114, 116; Squire *v.* American Express Co., 131 Ohio St. 239, 260, 2 N. E. 2d 766.

Appellants rely upon Vanston Bondholders Protective Committee *v.* Green, *supra*, 329 U. S. 156, 67 S. Ct. 237, 240, 91 L. Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U. S. at page 166, 67 S. Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F. 2d 266, certiorari denied Standard Gas & Electric Co. *v.* Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, lends some support to appellants' contention. However, the ruling is based

largely upon three cases, one of which was American Iron & Steel Mfg. Co. *v.* Seaboard Air Line Ry., *supra*, 233 U. S. 261, 34 S. Ct. 502, 58 L. Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York *v.* Saper, *supra*. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, *Circuit Judge*.

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28 U. S. C. provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * * upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the Declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to peti-

tion the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies; and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from the United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court sitting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the facts that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott *v.* Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule." The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was

not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England." * * *"

Study of the history of the Act reveals that the words "except with respect to Federal taxes" upon which this issue turns were not a part of the original statute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori*, an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he, as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U. S. C., as follows: "§960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee of the debtor corporations is on the same footing with any other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solvent* corporation engaged in a reorganization may have an equally large amount of tax liability, contingent upon the outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *insolvent* corporation should be in a preferred position. The possible loss of a favorable business transaction is insuffi-

cient reason of itself to create the extraordinary circumstances necessary for the injunctive relief sought by appellant. The Internal Revenue Code of 1954, section 7421, states the general rule: "(a) Tax. * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This restraint against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller *v.* Standard Nut Margarine Co., 284 U. S. 498, 509, 52 S. Ct. 260, 263, 76 L. Ed. 422.

This court has held that any exception to the universality of the application of section 7421 of the Internal Revenue Code must turn upon "present extraordinary and entirely exceptional circumstances." John M. Hirst & Co. *v.* Gentsch, 6 Cir., 1943, 133 F. 2d 247, 248. We stated there that the "circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued." In my judgment, departure from the clear statutory prohibition is not warranted in the present circumstances.

Inasmuch as the United States District Court had no jurisdiction over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commisioner as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reasons stated by him, that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax liability for lack of jurisdiction should, in my judgment, be affirmed.

Order

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 12,867

CHARLES J. GREGORY and CLYDE L. PAUL, Committee for Kentucky Fuel Gas Corporation 6½% Debentures, Appellant,

v.

THE COLUMBIA GAS SYSTEM INC., and SECURITIES AND EXCHANGE COMMISSION, Appellees.

Before SIMONS, Chief Judge, MARTIN and MILLER, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) CHARLES C. SIMONS
Chief Judge

Filed

February 14, 1957

Carl W. Reuss, Clerk

Order.

Nos. 12,861—12,867

UNITED STATES COURT OF APPEALS.

For the Sixth Circuit

In the Matter
of
Inland Gas Corporation,
Debtor,

In the Matter
of
Kentucky Fuel Gas Corporation,
Debtor,

In the Matter
of
American Fuel & Power Company,
Debtor.

Filed May 8, 1957

Carl W. Reuss, Clerk

Before:

Simons, Chief Judge, Martin and Miller, Circuit Judges:

The petitions for rehearing with requests for further oral argument *en banc*, filed herein by the Vanston Committee for Kentucky Fuel Gas Corporation First Mortgage Bonds, The Committee for the Holders of 6½%

Debentures of Kentucky Fuel Gas Corporation, and Paul E. Kern, having been considered by the Court;

And the Court adhering to the views previously expressed in its opinion of February 14, 1957, and in conformity with its rule with respect to hearings *en banc* on petitions for rehearing; *N. L. R. B.* v. *Cambria Clay Products Co.*, 229 F. (2) 433, C. A. 6th; *Northwest Airlines, Inc.* v. *Glenn L. Martin Co.*, 229 F. (2) 434, C. A. 6th;

It is ordered that the petitions for rehearing and requests for further oral argument *en banc* be denied.

Approved for entry:

/s/ Shackelford Miller, Jr.,
U. S. Circuit Judge.

Nos. 12,861-12,867

Simons, Chief Judge, dissenting. While I agree with that part of the order in the above causes which rejects the suggestion contained in the petitions for rehearing therein by the full membership of the court sitting *en banc*, contrary to our practice, I am of the opinion that the petitions for rehearing on the subject of post-bankruptcy interest should be granted, for the reasons developed in my original opinion in the case.

NO.

342

FILED
AUG 5 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 342

PAUL E. KERN, a holder of Kentucky Fuel Gas Corporation First Mortgage Bonds and 6½% Debentures,
Petitioner,

vs.

BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and of KENTUCKY FUEL GAS CORPORATION, THE COLUMBIA GAS SYSTEM, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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August 2, 1957

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IN THE

Supreme Court of the United States

October Term, 1957

No.

PAUL E. KERN, a holder of Kentucky Fuel Gas Corporation First Mortgage Bonds and 6½% Debentures,

Petitioner.

vs.

BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and of KENTUCKY FUEL GAS CORPORATION, THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Paul E. Kern, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming an order of the United States District Court for the Eastern District of Kentucky.

Opinions Below

The District Court (Ford, *J.*) wrote no opinion. Its order appears in Appendix A attached hereto, at pp. 20 to 22, *infra*. The opinion of the Court of Appeals (Simons, *C. J.*, with Miller and Martin, *JJ.*) Simons, *C. J.*, dissenting, is reported at 241 F. 2d 374 and appears in Appendix A, at pp. 23 to 43, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on February 14, 1957 (see p. 44, *infra*). A timely petition for rehearing was filed on March 5, 1957 and was denied by the Court of Appeals on May 8, 1957 (see pp. 45-46, *infra*). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

Questions Presented

1. Whether the power of the Bankruptcy Court to subordinate the debt claims of a faithless parent holding company to the debt claims of its subsidiaries' public security holders has been so restricted, either by this Court's decisions in *City of New York* v. *Saper*, 336 U. S. 328 (1949) and related cases[1] or otherwise, as to forbid subordination to the post-bankruptcy interest[2] accrued on unsecured public claims.

2. Whether the absolute priority rule embodied in the "fair and equitable" standard of Chapter X of the Bankruptcy Act has been so limited, by reason of the decisions of this Court in the *Saper* and related cases or otherwise, as to deny to post-bankruptcy interest on the unsecured claims of security holders the priority to which their principal is entitled.

Statutes Involved

The pertinent provisions of the Bankruptcy Act are set forth in Appendix B attached hereto, at pp. 47-48, *infra*.

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[1] *U. S.* v. *Edens*, 342 U. S. 912 (1952); *U. S.* v. *General Engineering & Mfg. Co.*, 342 U. S. 912 (1952); *U. S.* v. *Bloom*, 342 U. S. 912 (1952).

[2] The term "post-bankruptcy interest," when used herein, refers to interest accruing after the commencement of receivership or the filing of the petition in bankruptcy or reorganization.

Statement

These are reorganization proceedings under Chapter X of the Bankruptcy Act (11 U. S. C. § 501 *et seq.*), involving three closely inter-related principal debtors, American Fuel & Power Company ("American") and its two subsidiaries, Kentucky Fuel Gas Corporation ("Kentucky") and Inland Gas Corporation ("Inland").

The business of the American system is the production, purchase, and distribution at wholesale, of natural gas to industrial consumers (Al. App. 52-A to 63-A [3]). It was begun in 1927 and was financed largely by the public flotation of debt securities of the three debtors. From the time of its formation the system represented a serious competitive threat to Columbia Gas and Electric Corporation (now The Columbia Gas System, Inc., and herein referred to as "Columbia"). To eliminate that threat, Columbia "conceived a scheme to wreck" the system (122 F. 2d 223, 229), and in execution of that scheme, by 1930 acquired 76% of American's stock and approximately 35% of the aggregate indebtedness of the three debtors. Promptly after Columbia acquired control of the system, it forced the operating companies into receivership and, through its ownership of system securities, dominated the proceedings and eventually destroyed a substantial portion of the system's assets and potential. As the Court below found, "for the purpose of destroying" the system, Columbia "drew to itself the lifeblood of all the debtors and picked the flesh

[3] The record filed herein, which is the same as that on petitions already filed in this case, e.g. Nos. 241, 274 and 325, this term, consists of a certified copy of all Appendices filed below and of the proceedings in the Court of Appeals. Since the pages have not been numbered consecutively, we refer to the pages in the relevant Appendices as follows:

Appendix of	
Allen Committee and Edward D. Spilman	Al. App.
Trustees Ben Williamson, Jr. and Clinton M. Harbison	Tr. A.
Paul E. Kern	K. A.
Securities and Exchange Commission	C. A.

from the bones of these corporate entities" (122 F. 2d 223, 228). The Court concluded that Columbia's conduct violated the Federal antitrust laws, and that its result was "to defraud the minority interests of the debtors" (122 F. 2d 223, 229). As a consequence, it later directed that all of Columbia's claims against each of the debtors be subordinated to "the claims of all other creditors of every class" in the system (151 F. 2d 461, 470; 187 F. 2d 813, 817).[4]

Petitioner Paul E. Kern is a public creditor of Kentucky. He owns $773,600 principal amount of Kentucky's First Mortgage Bonds and $13,950 principal amount of Kentucky's Debentures. Other parties in the proceedings represent other public holders of Kentucky bonds and debentures and of American notes and stock. Since March 28, 1939, the Securities and Exchange Commission (the "Commission") has also participated, as permitted by Section 208 of the Bankruptcy Act (11 U. S. C. § 608).

During the course of these protracted proceedings there has been a material increase in the earnings of the American system, and thus in the value of its assets. Columbia having been subordinated, the system was able to make payments aggregating approximately $10,250,000 in retirement of substantial portions of principal and post-bankruptcy interest on its publicly held debt. Most of those payments went to the public holders of direct obligations of Inland, whose claims were paid in full,[5] and the balance went to American note holders and Kentucky bondholders (Al. App. 54-A-55-A, 58-A, 62-A). In more recent years earnings have continued to increase, so that as of

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[4] The bulk of the system's physical assets are owned by Inland. Under the cited decisions, the public creditors of American and Kentucky are entitled to share in Inland's assets in priority to Columbia.

[5] One aspect of their claims, the asserted right to receive interest on interest, was before this Court in *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 (1946).

December 31, 1955, the value of the system's assets totalled approximately $9,800,000.[6]

The claims of the remaining public holders of debt securities and of Columbia against these assets, as set forth in the Trustees' plan (Al. App. 56-A, 67-A to 75-A), with interest to December 31, 1955 computed at the contract rates but reduced by the amounts of past partial distributions, were approximately as follows as of December 31, 1955:

		Principal	*Interest*	*Total*
CLAIMS OF PUBLIC HOLDERS OF:				
American	7% Gold Notes	$1,905,100	$2,533,783	$ 4,438,883
Kentucky	6½% First Mortgage Bonds	2,236,600	3,316,692	5,553,292
	6½% Debentures	542,000	901,300	1,443,300
	Totals	$4,683,700	$6,751,775	$11,435,475
CLAIMS OF COLUMBIA AS HOLDER OF:				
Inland	6½% First Mortgage Bonds	$1,571,054	$2,610,965	$ 4,182,019
	7% Second Mortgage Debentures	320,000	569,511	889,511
	General claim for advances	252,313	413,775	666,088
American	7% Gold Notes	60,000	107,100	167,100
	6% Demand Notes	552,000	841,568	1,393,568
	General claim for advances	17,000	—	17,000
Kentucky	6½% First Mortgage Bonds	1,685,871	2,755,204	4,441,075
	6½% Debentures	397,600	661,176	1,058,776
	General claim for advances	65,607	107,652	173,259
	Totals	$4,921,445	$8,066,951	$12,988,396

The assets are thus more than sufficient to cover the principal of all of the claims of the public creditors of the system. The controversy here turns on the question whether the

[6] This value is based on the Trustees' Plan (Al. App. 51-A to 81-A) which in turn was predicated upon an offer by Tennessee Gas Transmission Company to purchase the system's physical assets for $8,000,000 (Al. App. 65-A) and upon net current assets of approximately $1,800,000 (Al. App. 76-A to 77-A).

excess values which are available for satisfaction of post-bankruptcy interest on claims of the system's public unsecured creditors must, as a matter of law, be diverted to Columbia's subordinated claims.

This issue arose at the hearing on confirmation of a plan proposed by the Trustees for the sale of the physical assets of the system and distribution of the proceeds, together with other net assets, to the public creditors of the system in payment of the principal and interest accumulated on their claims. The assets being insufficient to pay such claims in full, Columbia was not to participate (Al. App. 65-A). The District Court had referred the plan to the Commission, whose Report (Corp. Reorg. Rel. No. 98 [1956]) advised that it was fair, equitable and feasible. The District Court so found, approved the plan under Section 174 of the Bankruptcy Act (11 U. S. C. § 574) and directed that it be submitted to the vote of security holders (Tr. A. 54-59).

Kentucky bondholders rejected the Trustees' plan by approximately a two-thirds vote, primarily because adverse Federal tax rulings indicated that the debtors' estates would be subject to substantial capital gains tax upon the sale of assets (Tr. A. 60-71, 72-73, 109). The Trustee of Inland and Kentucky thereupon petitioned for a determination as to the tax consequences of the sale of assets (Tr. A. 74-81). The American Trustee petitioned for confirmation of the plan under the "cram down" provision of Chapter X (Tr. A. 84-86). Petitioner opposed the "cram down" (Tr. A. 87-90), and the Commission urged that, particularly in view of the availability of an alternative plan proposed by petitioner, the Trustees' plan should not be "crammed down" while the tax questions were undecided (Tr. A. 109; C. A. 1a-2a; Corp. Reorg. Rel. No. 98 [1956], p. 21).

During the resulting hearing, the District Judge stated that although "nobody has raised a question" as to the right of the Kentucky bond and debenture holders

to post-bankruptcy interest, he was "suggesting it as a possible question" (K. A. 5a). The Judge added that this issue, which he alone thus raised, might pose such "a serious threat" to the Kentucky bondholders as to induce petitioner to withdraw his objections to the Trustees' plan, which accorded recognition to such interest, and take a chance that the Court would confirm that plan in spite of any attack that might be made on the post-bankruptcy interest point (K. A. 5a-6a). Petitioner declined to withdraw his objections (Tr. A. 110). Thereupon, the District Judge announced from the bench, without any application for such relief by Columbia or anyone else and without calling for briefs or formal argument on the question, that he would not allow post-bankruptcy interest on the Kentucky bonds and debentures (Tr. A. 110; C. A. 3a).[7]

The District Judge subsequently entered an order (Appendix A, at pp. 20 to 22, *infra*) denying the relief sought by the Inland Trustee on the tax question, stating that the Trustees' Plan was "erroneous in allowing * * * post-bankruptcy interest" to Kentucky's public creditors (p. 21, *infra*) and declining to confirm that plan. The order went on explicitly to direct the Trustees to formulate a new plan "which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation" (p. 22, *infra*).

The offer to purchase the system's assets, upon which the Trustees' plan was based, was withdrawn during the pendency of the appeals to the Court below. However, that Court affirmed the order of the District Judge, including

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[7] In the colloquy from the bench, the District Judge went further, stating that any new plan need be submitted "to only Columbia for acceptance" (C. A. 3a, Tr. A. 110). Apparently he believed that as a result of his ruling on post-bankruptcy interest, the holders of Kentucky bonds and debentures, upon receiving payment of their principal, would be paid in full, even though the interest portion of their claims remained unsatisfied; that they would no longer be persons "affected" by a plan within the meaning of Chapter X and therefore would not be entitled to vote on any plan.

specifically the direction to the Trustees to propose a new plan eliminating post-bankruptcy interest on Kentucky's publicly held bonds and debentures, Simons, *C. J.*, dissenting on that point (see pp. 34-35, and 46, *infra*).

To understand the significance of the ruling of the courts below, it is necessary to note that the history of these proceedings is primarily that of a prolonged struggle between the public creditors of the system on the one side, and Columbia (and often the debtors' Trustees[5]) on the other, for priority in claim to the system's available assets. On three occasions—in 1941, 1945 and 1951—the Court below was faced squarely with Columbia's efforts to claim a portion of the debtor's assets at the expense of the public creditors (122 F. 2d 233 [1941]; 151 F. 2d 461 [1945] rehg. and mod. den. 153 F. 2d 101 [1946], cert. den. 329 U. S. 737 [1946]; 187 F. 2d 813 [1951]). On two later occasions, Columbia's claims were collaterally involved (211 F. 2d 381 [1954], cert. den. 348 U. S. 840 [1954]; 217 F. 2d 207 [1954]). On none of these occasions, nor at any other time, did the Court below in any way qualify its findings as to Columbia's culpability, or its conclusion that the damage caused by Columbia to all of the system's public security holders, while not determinable with precision, was nonetheless of such magnitude as to require subordination of Columbia's claims (151 F. 2d 461, at 469; 153 F. 2d 101, 102) until all public creditors of the three debtors were "fully paid" (211 F. 2d 381, 384, 217 F. 2d 207, 208).

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[5] The Trustees on more than one occasion sided with Columbia against the system's public creditors. Twice they succeeded in obtaining District Court approval of arrangements which allowed Columbia to share in the debtors' assets, only to be reversed by the Court of Appeals (see 122 F. 2d 223; 187 F. 2d 813). Moreover, according to the published reports they failed to participate in opposition to Columbia in the appellate proceedings reported at 151 F. 2d 461; and they did not appeal on the post-bankruptcy interest point in the Court below. Nor does the petition for certiorari filed here by the Trustee of Inland and Kentucky base its request for the writ or raise any question on the post-bankruptcy interest point, although that issue affects the disposition of approximately 40% of the value of the assets in his hands.

Despite this history, the Court below has now ruled that Columbia must be paid at least its principal[9] before Kentucky's public creditors receive their interest. This ruling was not based upon new facts or findings suggesting that Columbia was any less culpable than it had previously been found to be. Nor was there any suggestion that Kentucky's public creditors had suffered any less damage than those of Inland, who have already received full payment, including post-bankruptcy interest. On the contrary, the Court below concluded that it must limit the restitution provided through the subordination remedy to the principal amount of the public creditors' claims because it understood it was required to do so by the decisions of this Court in *City of New York* v. *Saper*, 336 U. S. 328 (1949), and related cases.

Reasons Relied on for Allowance of the Writ

First: The Court below decided an important question of law in the administration of the Bankruptcy Act in a way which conflicts with the decision of this Court and the subsequent decision of the Court of Appeals for the Tenth Circuit in the *Deep Rock* reorganization, and contradicts the principles which this Court has held to govern the equitable subordination of claims in bankruptcy.

In *Taylor* v. *Standard Gas and Electric Company*, 306 U. S. 307 (1939), this Court directed the subordination of the debt claims of the parent of Deep Rock Oil Corporation, a debtor in reorganization, to the claims of Deep Rock's public preferred stockholders. Deep Rock also had public unsecured noteholders whose claims, including post-bankruptcy interest, this Court's opinion explicitly assumed

[9] The principal amount of Columbia's claims is $4,921,445. In its brief in the Court below, Columbia claimed that it had "total claims of $7,979,403 (principal plus interest on *secured* obligations)" with respect to which it was apparently asserting priority over the unsecured interest claims of Kentucky's public security holders (Br. p. 38).

would first be satisfied in full before the parent's subordinated debt claims could be honored (306 U. S. at 314). The plan formulated in accordance with this Court's direction subordinated the debt claims of the parent to the claims for post-bankruptcy interest and dividends on Deep Rock's publicly held unsecured notes and preferred stock. The Court of Appeals for the Tenth Circuit upheld the plan, expressly rejecting the contention that the so-called "bankruptcy rule" as to post-bankruptcy interest forbade such subordination *In re Deep Rock Oil Corp.*, 113 F. 2d 266, 269 (C. A. 10, 1940); cert. den. 311 U. S. 699 (1940).

In direct conflict with these decisions, the Court below held it was obliged to restrict the subordination previously ordered for Columbia's claims to subordination to the principal of the public security holders' unsecured claims, on the ground that it could not lawfully subordinate Columbia to the post-bankruptcy interest on the public's claims. The Court acknowledged that this result was inconsistent with the *Deep Rock* decisions. But it thought the *Deep Rock* doctrine had been modified by the decisions of this Court in *Saper* and related cases (see pp. 38-39, *infra*).[10]

The decision below not only conflicts with the *Deep Rock* reorganization cases (see also *Eddy* v. *Prudence Bonds Corporation*, 165 F. 2d 157, 159-160 [C. A. 2, 1947], cert. den. 333 U. S. 845 [1948]), but it erodes the principles upon which this Court rested its *Taylor* and following decisions—*Pepper* v. *Litton*, 308 U. S. 295 (1939); *American United Mutual Life Insurance Co.* v. *City of Avon Park*, 311 U. S. 138 (1940); *Sampsell* v. *Imperial Paper & Color Corporation*, 313 U. S. 215 (1941). Under those principles, whatever may be the rationale of decisions disallowing interest claims in other contexts (*e.g.*, *Jamison*

[10] Counsel for Columbia, long experienced in bankruptcy reorganization, also are of the view "that, in so far as the Tenth Circuit's decision on remand of *Deep Rock* conflicts with the Supreme Court's subsequent *Saper* and *Ecker* decisions, it is overruled" (Columbia Reply Br. in the Court below, p. 9).

. F. D. I. C., 149 F. 2d 199 [C. A. 5, 1945]; *New York Trust Co. v. Detroit, T. & I. Ry. Co.*, 251 Fed. 514 [C. A. 6, 1918]), the "power of the bankruptcy court to subordinate claims or to adjudicate equities" in order to compensate for a controlling person's past iniquities is "complete" (*Sampsell v. Imperial Paper & Color Corporation*, 313 U. S. 215, 219). And where matters affecting interest are concerned "the touchstone of each decision * * * has been a balance of equities * * *." (*Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 at 165).

In contrast, under the ruling below, the court is precluded from making adjustments which the equities may require.[11] It becomes an instrument for rewarding the wrongdoer. It must withhold interest from public security holders during the period of bankruptcy, and, when distribution is finally made, must allocate the values available to pay the interest thus withheld to the very person who was ordered to be subordinated for having deliberately caused the bankruptcy and injured the debtors and their public security holders.

Both the import and the incongruity of the ruling below are emphasized by the Court's reliance on what it deemed to be the command of this Court in *Saper* and related cases, which deal with the special statutory priority accorded to tax claims. In those cases, this Court found on the basis of specific legislative history[12] that Congress intended to bring interest on tax claims within the "bankruptcy rule" applicable to post-bankruptcy interest on unsecured claims generally (see 336 U. S. at 330, note 7), even though the principal of tax claims enjoyed a statutory priority over

[11] The irrationality of the conclusion of the Court below that it had no power to subordinate Columbia to the Kentucky post-bankruptcy interest is emphasized by its recognition of its power totally to reject Columbia's claims.

[12] In *Saper*, this Court noted (336 U. S. at 329 n. 5) that underlying the legislation was "frequently expressed dissatisfaction over the inroads taxes and interest thereon make in the fund available for creditors."

other unsecured claims. On the facts there presented, the "bankruptcy rule" operated to preclude recognition of interest on the tax claims.

Significantly, this "rule" is designed in large part to preserve equality among creditors of equal rank as of the date of insolvency by preventing the delays caused by the law in administering a bankrupt's assets from operating unequally among creditors. See *American Iron and Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266-267 (1914); *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 163-164 (1946); cf. *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 411 (1938). In contrast, the *Deep Rock* principle is designed to deny equality to the claims of the faithless parent so that restitution may be made to the public claimants for the damage caused by its misconduct of the subsidiary's affairs.

The incongruity of extending the "bankruptcy rule" to a case of equitable subordination of a wrongdoer is accentuated in cases like this where it is the parent's misconduct which is the effective cause of withholding or delaying interest payments to public security holders. The reliance for that result upon *Saper* and related decisions of this Court, which are grounded uniquely in considerations peculiar to tax claims, underscores the need for the exercise by this Court of its corrective power.

Second: The decision below conflicts with the absolute priority rule which this Court has repeatedly held to be integral to the "fair and equitable" standard governing corporate reorganizations.

Under the absolute priority rule, as was pointed out in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527 (1941), "accrued interest * * * is entitled to the same priority as the principal. See *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266, 267; *Ticonic National Bank* v. *Sprague*, 303 U. S. 406." This requirement applies to post-bankruptcy interest on all

types of claims, whether secured,[13] or unsecured,[14] and to post-bankruptcy dividends on preferred stock.[15]

Departing from that requirement, the Court below denied that interest on the publicly held Kentucky bonds and debentures was entitled to the same priority as principal. To reach this result, it declined to confine the "bankruptcy rule" to claims of equal rank, and instead interpreted *Saper* and *Edens* to require the extension of that "rule" to the claims of security holders of different rank in a corporate reorganization, and specifically to hold that payment of the principal of unsecured bondholders' claims is payment "in the manner which the bankruptcy law recognizes as payment in full" (p. 36, *infra*).

We doubt that, apart from special considerations such as those found in *Saper* to govern tax claims, there is any rule as between security holders of different rank, even in straight bankruptcy, which denies to interest the same priority as principal. Indeed the historical "exceptions"

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[13] *E.g., Group of Institutional Investors* v. *Chicago M. St. P. & P. R. Co.*, 318 U. S. 523, 546 (1943); see *Eddy* v. *Prudence Bonds Corporation, supra.* By the same token, to the extent of a deficiency of pledged assets to satisfy a secured claim, principal is treated like the principal of unsecured claims and interest is treated like the interest on unsecured claims. Cf. *Group of Institutional Investors* v. *Chicago M. St. P. & P. R. Co.*, 318 U. S. at 572-573.

[14] *E.g., Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. at 514-516, 520-521, 527, dealing with the priority, as against stockholders, of bondholders' claims for accrued interest against unmortgaged assets. See also *In re Deep Rock Oil Corporation, supra*, at 269; *Central States Electric Co.* v. *Austrian*, 183 F. 2d 879 (C. A. 4, 1950), cert. den. 340 U. S. 917 (1951). The ICC includes post-bankruptcy interest in the computation of the claims of both secured and unsecured creditors which must be satisfied before lower ranking claims may participate. See *e.g., Chicago, R. I. & Pac. Ry. Co.* v. *Fleming*, 157 F. 2d 241 (C. A. 7, 1946), cert. den. 329 U. S. 780 (1946).

[15] *E.g., Petition of Portland Electric Power Co.*, 162 F. 2d 618, 622 (C. A. 9, 1947), cert. den. 332 U. S. 847 (1947); *In re Deep Rock Oil Corporation, supra*, at 269; *Central States Electric Co.* v. *Austrian, supra*, at 885-888.

to the "bankruptcy rule", to which the Court below alludes (see pp. 31-32, 35-36, *infra*) and this Court alluded in *Saper* (336 U. S. at 330, note 7), demonstrate that where claims of different rank are involved, interest does not "stop", because the "bankruptcy rule", in conformity with the absolute priority rule, requires the same priority for interest (whether pre or post-bankruptcy) as for principal.[16]

But, whatever may be the "rule" in straight bankruptcy, it is startling to see the absolute priority rule which governs security holders' claims in corporate rerganizations under Chapter X[17] undermined on the basis of decisions in which this Court applied the "bankruptcy rule" to limit the

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[16] *E.g.*, (1) as between senior and junior lienors on a common security (*American Iron and Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266 (1914); *Central Trust Co.* v. *Condon*, 67 Fed. 84, 98 (C. A. 6, 1895) (Taft, J.); *Richmond & I. Const. Co.* v. *Richmond N. I. & B. R. Co.*, 68 Fed. 105, 116 (C. A. 6, 1895), cert. den. 163 U. S. 679 [1895]), (2) as between secured creditors and unsecured creditors to the extent the security is adequate to pay principal and interest (see *Coder* v. *Arts*, 213 U. S. 223, 228-229, 245 [1909]; *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 411-412 [1938]; cf. *Sexton* v. *Dreyfus*, 219 U. S. 339, 346 [1911]), and (3) as between any and all creditors, whether secured or unsecured, and the debtor to the extent any assets are available for the debtor (*Johnson* v. *Norris*, 190 Fed. 459, 463 [C. A. 5, 1911], cert. den. 232 U. S. 723 [1914]). Although no decision of this Court expressly so holds in straight bankruptcy, it is difficult to see why the principle which requires post-bankruptcy interest to be accorded priority as between senior and junior lienors on common security does not apply equally as between senior and junior unsecured creditors, other than tax claimants or others who are governed by special considerations.

[17] Even if the enactment of the "bankruptcy rule" in Section 63(a) of the Bankruptcy Act (11 USC Sec. 103(a)), could be said to limit provability and allowability of post-bankruptcy interest where claims of different rank are involved in ordinary bankruptcy (but cf. p. 13, *supra*) it has no application to reorganizations under Chapter X in view of Section 102 of the Bankruptcy Act (11 USC Sec. 502) and the broad definition of "claims" in Section 106(1) (11 USC Sec. 506(1)).

special statutory priority of tax claims to their principal. To be sure, the particular considerations affecting tax claims apply to such claims in corporate reorganizations as well as in straight bankruptcy (*United States* v. *Edens*, 342 U. S. 912 [1952]). But nothing ever held by this Court in any case suggests that *Saper* or *Edens* was intended to govern anything other than tax claims; certainly not the determination of priorities as to interest among security holders *inter se* in corporate reorganizations.

Nevertheless, this Court's statement in *Saper* that tax claims are to be treated no differently from other debts because Congress has "assimilated taxes to other debts for all purposes, including post-bankruptcy interest" (336 U. S. 337-338) has become the basis for expansive application of that decision by the lower Federal courts.[18] This process has culminated in this case in the extension of that decision to the claims of security holders of different rank *inter se* in a corporate reorganization under the "fair and equitable" standard. The doubts thus cast upon the priority to be accorded post-bankruptcy interest on security holders' claims in all kinds of insolvency, but particularly under the "fair and equitable" standard of Chapter X call imperatively for clarification by this Court.

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[18] Thus, it has been explicitly stated, albeit in a case involving a tax claim, that since this Court's decision in *Saper*, no claim of any kind bears interest after bankruptcy, and that therefore no claim for post-bankruptcy interest in a corporate reorganization is any longer entitled to the benefit of the rule of absolute priority (*State of New York* v. *Feinberg*, 204 F. 2d 502, 503 [C. A. 2, 1953]). No other lower court decision except that below has gone so far. However, the lower Federal courts have cited *Saper* in cases which sometimes grant and sometimes deny recognition of post-bankruptcy interest on non-tax claims, as part of a general body of authority for the "rule" on post-bankruptcy interest (Compare *e.g.*, *In re Macomb Trailer Coach, Inc.*, 200 F. 2d 611, 613 [C. A. 6, 1952] cert. den. sub nom. *McInnis* v. *Weeks*, 345 U. S. 958 [1953], and *In re Worden*, 107 F. Supp. 496 [W. D. Ky., 1952], with *Oppenheimer* v. *Oldham*, 178 F. 2d 380 [C. A. 5, 1949], and *Meinhard, Greene & Co., Inc.* v. *Brown*, 193 F. 2d 70, 74 [C. A. 4, 1952]).

Third: The issues raised by the decision below are of large significance in the administration of the Bankruptcy Act.

Post-bankruptcy interest is an important component of claims presented in all corporate reorganizations. To be sure, in the instant case, almost twenty-seven years of proceedings have produced an interest claim which is substantially greater than the principal. But the history of corporate reorganizations discloses that the proceedings generally extend over period ranging from five to twenty years, and in the case of railroads sometimes longer.[19] Such delay is not infrequently caused by junior, and often controlling, interests who thereby can speculate on an increase in the earnings and value of the underlying assets while the senior interests who hold the major, and often the exclusive, claims upon the assets, bear the risk. The barring of post-bankruptcy interest to senior security holders who are subject to such risks would constitute a radical dilution of their rights in corporate reorganizations.

Nor does the fact that the decision below purports to be limited to interest on unsecured claims detract from its importance. Where the question involved is one of subordination or of absolute priority, no rational distinction can be drawn between secured and unsecured claims. Thus, the ruling below casts a shadow upon both types of claims. But even if the impact of the decision below could be confined to unsecured claims, it should be noted that the volume of unsecured notes and debentures publicly owned and traded in the nation's capital markets is so substan-

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[19] See e.g. data collected for railroad reorganizations in *Dembitz, Progress and Delay in Railroad Reorganizations since 1933*, 7 Law and Contemporary Problems, 393 (1940); and for Chapter X reorganizations in Billyou, *A Decade of Reorganization under Chapter X*, 49 Col. L. Rev. 456, 495 (1949).

tial [20] that it affects the interests of large numbers of investors—both institutional and individual.

Fourth: These proceedings imperatively call for the exercise at this time of this Court's supervisory power over the Federal courts.

These proceedings have already endured for almost twenty-seven years, largely in the struggle of the public creditors against Columbia. Under the judgment below, the Trustees are directed to formulate a new plan which eliminates public creditors' post-bankruptcy interest. If, as we submit, that decision is improper, the parties will be remitted to further extensive and time-consuming procedures in the courts below, all focused on a plan whose major premise is untenable. Moreover, intimations have already appeared in these proceedings to suggest substantial controversies to which this premise will give rise in the formulation and judicial assessment of any new

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[20] The following table, compiled from Standard Corporation Descriptions, shows the volume of new offerings of debt securities of non-governmental domestic issuers, and the portion thereof which is unsecured, during the years 1951-1956:

Year	New Offerings of Debt Securities *Principal Amount*	Unsecured Notes and Debentures *Principal Amount*	*Percent % of Total Represented by Unsecured Debt*
1951	$2,752,457,272.	$ 929,508,400.	34
1952	3,735,106,411.	1,732,574,000.	46
1953	4,511,962,005.	1,929,299,830.	43
1954	4,346,019,970.	1,872,394,720.	43
1955	4,038,020,850.	2,272,210,850.	56
1956	4,627,735,095.	2,614,116,895.	56

See Standard Corporation Descriptions, New Bond Offerings, Vol. 13 (1951) pp. 53-61, Vol. 14 (1952) pp. 52-61, Vol. 15 (1953) pp. 49-57, Vol. 17 (1954) pp. 64-73, Vol. 18 (1955) pp. 68-79, and Vol. 18 (1956) pp. 56-67.

plan,[21] as well as in the process of obtaining security holder approval thereof (cf. note 7, *supra*). Nor do the several prior opinions of the Court of Appeals in these proceedings dealing with the competing claims of the security holders of the various debtors—both *inter se* and against Columbia—by any means resolve these controversies.

In short, correction of the order of the Court below at this time is imperative if further needless delay in already unduly protracted proceedings is to be avoided. This is compellingly a case in which the grant of certiorari "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause" (*American Construction Co.* v. *Jacksonville T. & K. W. Railways Co.*, 148 U. S. 372, 384 [1893]) because resolution of the post-bankruptcy interest question at this time is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 685 n. 3 (1949); *Land* v. *Dollar*, 330 U. S. 731, 734 n. 2 (1947); *Chapman* v. *Sheridan Wyoming Co.*, 338 U. S. 621, 622 (1950).

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[21] Thus Columbia has suggested in its brief below that as the holder of secured obligations of Inland it is entitled to be paid not only principal but all post-bankruptcy interest thereon before the public holders of Kentucky's "unsecured" bonds and debentures receive interest (See note 9 *supra*). There is also the question whether the considerations which impelled the Court to disentitle Kentucky's security holders to post-bankruptcy interest do not apply equally to American's "secured" public creditors because their "security" is valueless. Finally, with the increasing cash assets of the system, payment of only the principal amount of the claims of all creditors, including Columbia, will leave a surplus of assets available for distribution on account of such post-bankruptcy interest. The proper allocation of that fund among the various post-bankruptcy interest claimants will present novel and time-consuming legal problems.

CONCLUSION

The writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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August 2, 1957.

APPENDIX A

Order of H. Church Ford, U. S. D. C. J., Dated March 14, 1956, From Which Appeal Was Taken to United States Court of Appeals for the Sixth Circuit

This cause came on for hearing on March 8, 1956, at Lexington, in said district, pursuant to notice duly given as provided by law.

Thereupon the Court proceeded to consider the petition of Clinton M. Harbison, Trustee of American Fuel & Power Company, praying that the Court confirm the "Amended Plan of Reorganization dated February 12, 1953, as further amended September 23, 1955, and as finally amended", under the provisions of Sections 179 and 216(7) of the Bankruptcy Act, regardless of the fact that two-thirds in amount of the public holders of Kentucky Fuel Gas Corporation bonds have not accepted said plan. And the Court heard testimony offered in support of the confirmation of said plan and also heard argument of counsel in favor of the confirmation of said plan, by counsel for said Clinton M. Harbison, Trustee as aforesaid; and by counsel for Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, and by counsel for various interested creditors herein, and also heard argument of counsel for Paul E. Kern and counsel for certain American Fuel & Power Company stockholders in opposition to the confirmation of said plan. The Court also heard a statement by counsel for the Securities Exchange Commission to the effect that further consideration of the confirmation of said plan should await a determination of the federal income tax question raised by petition filed herein by Ben Williamson, Jr., Trustee as aforesaid, as hereinafter mentioned.

Without making any decision upon said petition of Clinton M. Harbison, Trustee as aforesaid, the Court called up for consideration the petition filed herein by said Ben

Williamson, Jr., Trustee as aforesaid, for an adjudication that no federal income tax liability will be incurred by the estates of the Debtors by reason of the sale of certain assets as provided in said Plan, and for injunctive relief. Thereupon came Henry J. Cook, United States Attorney, and C. S. Titus, special counsel, and appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for the District of Kentucky, and filed a motion to dismiss said petition of Ben Williamson, Jr., Trustee, for want of jurisdiction. After hearing argument of counsel on said motion, the Court was of opinion that said petition is in effect an application for a declaratory judgment and under the provisions of the Federal Declaratory Judgment Act this Court is without jurisdiction to entertain the petition. Whereupon it is ORDERED that said motion be and the same is hereby sustained and said petition of Ben Williamson, Jr., Trustee as aforesaid, is hereby dismissed.

The Court then proceeded to consider further the above mentioned petition of Clinton M. Harbison, Trustee as aforesaid, to confirm said plan. And thereupon the Court announced from the bench that he was of opinion that the public holders of bonds and debentures of Kentucky Fuel Gas Corporation, being unsecured creditors, are not entitled to post-bankruptcy interest on their claims and that said plan is erroneous in allowing such post-bankruptcy interest, and for that reason, and for the further reason that the Court lacks jurisdiction and hence cannot pass upon the tax question presented by said petition of Ben Williamson, Jr., Trustee as aforesaid, and because of the uncertainty resulting from such undetermined tax question, the Court was of opinion that the plan should not be confirmed. Whereupon it is ORDERED that said petition of Clinton M. Harbison, Trustee as aforesaid, be and the same is hereby dismissed and confirmation of said plan is denied.

The Court then proceeded to consider the proposed plan of reorganization offered by Paul E. Kern, and dated July 7, 1955, and the Court was of opinion that said Kern plan is not worthy of consideration for the reason that it proposes to encumber the reorganized corporation with a heavy indebtedness, and for other reasons stated from the bench. Whereupon it is ORDERED that said Kern Plan be and it is hereby adjudged not worthy of consideration within the meaning of Chapter X of the Bankruptcy Act.

The Court then directed the Trustees herein to prepare and file a new Plan of Reorganization which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation.

Robert S. Spilman, Jr., counsel for certain stockholders of American Fuel & Power Company then moved the Court to require Ben Williamson, Jr., Trustee as aforesaid, to mail to him certain statements with respect to the business, and operations of Inland Gas Corporation. Whereupon it is ORDERED that said Trustee shall forthwith furnish to said counsel copies of monthly reports gotten out by said Trustee for the year 1955, and hereafter furnish to said counsel copies of all reports with respect to Inland Gas Corporation and its business and operations which are furnished by said Trustee to other counsel of record in this proceeding.

March 14, 1956.

Enter,

/(s) H. CHURCH FORD,
Judge.

Opinion of United States Court of Appeals for the Sixth Circuit, Dated February 14, 1957

In re INLAND GAS CORPORATION, Debtor.

In re KENTUCKY FUEL GAS CORPORATION, Debtor.

In re AMERICAN FUEL & POWER COMPANY et al., Debtor.

Nos. 12861-12867.

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge.

After more than twenty-six years of Receiver and Trustee operation of the Debtors' properties, of litigation delaying reorganization under Chapter X of the Bankruptcy Act, 11 U. S. C. A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas & Electric Corporation v. United States, 6 Cir., 151 F. 2d 461, modification denied, 6 Cir., 153 F. 2d 101, certiorari denied 329 U. S. 737, 67 S. Ct. 48, 91 L. Ed. 636; In re Inland Gas Corporation, 6 Cir., 187 F. 2d 813; In re Inland Gas Corporation, 6 Cir., 208 F. 2d 13; In re Inland Gas Corporation, 6 Cir., 211 F. 2d 381, certiorari denied Kern v. Williamson,

348 U. S. 840, 75 S. Ct. 45, 99 L. Ed. 662; In re Inland Gas Corporation, 6 Cir., 217 F. 2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan entitled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Court circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modification. The important new developments consisted of a substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so, the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the

Internal Revenue Code of 1954, 26 U. S. C. A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offered $8,000,000.00 in cash for the same properties which it confirmed by a deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation for the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purposes of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decision is correct, the Federal tax involved would be approximately $1,192,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these rulings and as an assumed

result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U. S. C. A. §§ 2201, 2202, it was without jurisdiction to entertain it. Whereupon, it ordered that the petition of the Trustee be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors,

were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganized corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as evidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect.. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and

within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unneeessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed," so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in a Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for a successful and prompt

reorganization by the $8,000,000.00 offer received by Tennessee. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and the release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the petitions, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U. S. C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421 of the Internal Revenue Code of 1954, 26 U. S. C. A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C. F. R. § 1.337-2(b). The problem with which § 337 was

concerned arose out of the decisions in Commissioner v. Court Holding Co., 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981, and United States v. Cumberland Public Service Co., 338 U. S. 451, 70 S. Ct. 280, 94 L. Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re American Fuel & Power Co., 6 Cir., 151 F. 2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Irland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F. 2d 813, 819, we said: "The

order will be amended by direction to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered to those rulings. 217 F. 2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) If the alleged bankrupt proves solvent, post-bankruptcy interest

is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bankruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period a difference of opinion as to allowance of interest on tax claims. They were considered in some jurisdictions as claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the light of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr. Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 67 S. Ct. 237, 241, 91 L. Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F. 2d 266, certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, and its predecessor, Taylor v. Standard Gas & Electric Co., 306 U. S. 307, 618, 59 S. Ct. 543, 83 L. Ed. 669, that, as said in Sampsell, 313 U. S. at page 219, 61 S. Ct. at page 907, "The power of the bankruptcy court to subordinate

claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further observation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F. 2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation, for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan of reorganization, which may or may not contain a provision for sale of the properties, or which may or may not submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems here involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted,

we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debenture asks us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12865, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with

the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, *Circuit Judge*

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 163, 67 S. Ct. 237, 91 L. Ed. 162; Sexton v. Dreyfus, 219 U. S. 339, 344, 31 S. Ct. 256, 55 L. Ed. 244; City of New York v. Saper, 336 U. S. 328, 330-331, 69 S. Ct. 554, 93 L. Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.,

233 U. S. 261, 267, 34 S. Ct. 502, 58 L. Ed. 949; City of New York v. Saper, supra, 336 U. S. 328, at page 330, 69 S. Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle of the debt secured, the excess should be applied to post-bankruptcy interest on the obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F. 2d 611, 613, certiorari denied McInnis v. Weeks, 345 U. S. 958, 73 S. Ct. 940, 97 L. Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 and Pepper v. Litton, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp.,

5 Cir., 149 F. 2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On the contrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York v. Saper, supra, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U. S. C. A. The Court said 336 U. S. at page 337, 69 S. Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64, sub. a, and 57, sub. n [11 U. S. C. A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X. United States v. Edens, 4 Cir., 189 F. 2d 876, affirmed 342 U. S. 912, 72 S. Ct. 357, 96 L. Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F. 2d 80, affirmed 342 U. S. 912, 72 S. Ct. 358, 96 L. Ed. 682; Pavone Textile Corp. v. Bloom, 302 N. Y. 206, 97 N. E. 2d 755, affirmed sub nom., United States v. Bloom, 342 U. S. 912, 72 S. Ct. 357, 96 L. Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F. 2d 10, certiorari denied

342 U. S. 918, 72 S. Ct. 364, 96 L. Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F. 2d 865, certiorari denied 348 U. S. 830, 75 S. Ct. 53, 99 L. Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F. 2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp., supra, 5 Cir., 149 F. 2d 199; United States v. Paddock, 5 Cir., 187 F. 2d 271, 276; Application of Progress Shoe Co., D. C. E. D. N. Y., 107 F. Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N. E. 2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U. S. 156, 67 S. Ct. 237, 240, 91 L. Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U. S. at page 166, 67 S. Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F. 2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U. S.

261, 34 S. Ct. 502, 58 L. Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, *Circuit Judge.*

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28, U. S. C. provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * * upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the Declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies; and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court sitting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule."

The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. * * *"

Study of the history of the Act reveals that the words "except with respect to Federal taxes" upon which this issue turns were not a part of the original statute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori*, an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he, as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U. S. C., as follows: "§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee o the debtor corporations *is on* the same footing with an other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solven* corporation engaged in a reorganization may have a equally large amount of tax liability, contingent upon th outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *in solvent* corporation should be in a preferred position. Th possible loss of a favorable business transaction is insuffi cient reason of itself to create the extraordinary circum stances necessary for the injunctive relief sought by appel lant. The Internal Revenue Code of 1954, section 7421 states the general rule: "(a) Tax. * * * no suit for th purpose of restraining the assessment or collection of an tax shall be maintained in any court." This restrain against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller v Standard Nut Margarine Co., 284 U. S. 498, 509, 52 S. Ct 260, 263, 76 L. Ed. 422.

This court has held that any exception to the universa ity of the application of section 7421 of the Internal Revenu Code must turn upon "present extraordinary and entirel exceptional circumstances." John M. Hirst & Co. Gentsch, 6 Cir., 1943, 133 F. 2d 247, 248. We stated the that the "circumstances that are to be considered extr ordinary or exceptional have never, of course, been cat logued." In my judgment, departure from the clear stat tory prohibition is not warranted in the present circu stances.

Inasmuch as the United States District Court had no *jurisdiction* over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commissioner as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reasons stated by him, that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax liability for lack of jurisdiction should, in my judgment, be affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 12,862

PAUL E. KERN, a Creditor of Kentucky Fuel Gas Corporation,

Appellant,

v.

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, et al.,

Appellees.

Before SIMONS, Chief Judge, MARTIN and MILLER, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ CHARLES C. SIMONS
Chief Judge

FILED
February 14, 1957
Carl W. Reuss, Clerk

Order

Nos. 12,861—12,867

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

In the Matter of

Inland Gas Corporation,

Debtor,

In the Matter of

Kentucky Fuel Gas Corporation,

Debtor,

In the Matter of

American Fuel & Power Company,

Debtor.

Filed May 8, 1957

Carl W. Reuss, Clerk

Before:

Simons, *Chief Judge*, Martin and Miller, *Circuit Judges*.

The petitions for rehearing with requests for further oral argument en banc, filed herein by the Vanston Committee for Kentucky Fuel Gas Corporation First Mortgage Bonds, The Committee for the Holders of 6½% Debentures of Kentucky Fuel Gas Corporation, and Paul E. Kern, having been considered by the Court:

And the Court adhering to the views previously expressed in its opinion of February 14, 1957, and in conformity with its rule with respect to hearings en banc on petitions for rehearing: *N. L. R. B. v. Cambria Clay Products Co.*, 229 F. (2) 433, C. A. 6th; *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 229 F. (2) 434, C. A. 6th;

IT IS ORDERED that the petitions for rehearing and requests for further oral argument en banc be denied.

Approved for entry:

s SHACKELFORD MILLER, JR.,
U. S. Circuit Judge

Nos. 12,861-12,867

SIMONS, Chief Judge, dissenting. While I agree with that part of the order in the above causes which rejects the suggestion contained in the petitions for rehearing therein by the full membership of the court sitting en banc, contrary to our practice, I am of the opinion that the petitions for rehearing on the subject of post-bankruptcy interest opinion in the case.
should be granted, for the reasons developed in my original

APPENDIX B

The pertinent provisions of the Bankruptcy Act, 52 Stat. 840, 11 U. S. C. 1 *et seq.*, are as follows:

Section 57n, 11 U. S. C. 93n: Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: * * *

Section 63a (1), 11 U. S. C. 103a (1): Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date * * *

Section 102, 11 U. S. C. 502: The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23, subdivisions h and i of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive * * *

Section 106, 11 U. S. C. 506: For the purposes of this chapter, unless inconsistent with the context—

(1) "claims" shall include all claims of whatever character against a debtor or its property, except stock, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent: * * *

(4) "creditors" shall mean the holder of any claim:

* * *

Section 174, 11 U. S. C. 574: After the hearing, as provided in Section 169 or Section 170 of this Act, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in Section 172 of this Act, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of Section 216 of this Act, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same.

* * *

Section 221, 11 U. S. C. 621: The judge shall confirm a plan if satisfied that—

* * *

(2) The plan is fair and equitable and feasible * * *

FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 342

PAUL E. KERN, a holder of Kentucky Fuel Gas Corporation First Mortgage Bonds and 6½% Debentures,
Petitioner,

vs.

BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and of KENTUCKY FUEL GAS CORPORATION, THE COLUMBIA GAS SYSTEM, INC., et al.,
Respondents.

PETITION FOR REHEARING

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Dated: November 1, 1957.

NO.

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Respondents.

PETITION FOR REHEARING

Petitioner, Paul E. Kern, prays that the Court reconsider the denial on October 14, 1957 of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit herein, and that the writ of certiorari be issued as requested.

The conflict between the decision below on the one hand, and the decisions of this Court [306 U. S. 307 (1939)] and of the Court of Appeals for the Tenth Circuit [113 F. 2d 266 (1940)] in the *Deep Rock* reorganization on the other, was clearly recognized by the majority below [241 F. 2d 374, 383]. Though counsel for respondent denied existence of that conflict in their response here, they had explicitly recognized it in their briefs below not only once but twice (Brief, p. 31; Reply brief, pp. 7-8). That the petition

presents an important question in the administration of the Bankruptcy Act which was improperly decided below was urged upon this Court by the Securities and Exchange Commission as well as by petitioner. In the circumstances, and with appropriate deference since we cannot know the reason, we attribute this Court's denial of certiorari not to its having concluded that there is no conflict, or that the issue is not worthy of review here, but to the fact that the decision below is not a final judgment. It is to this ground that this petition is addressed.

The disinclination of this Court to grant certiorari to review decisions which are not final judgments rests in fundamental part on a sound principle which we do not dispute—that the issues raised by a petition for review of a non-final judgment may in one way or another disappear in subsequent proceedings in the courts below. In such circumstances, denial of certiorari serves to relieve this Court of the obligation to decide an issue which may eventually prove unnecessary to the disposition of the case.

We respectfully submit, however, that in this case, although the decision below is not a final judgment, the issue on which review has here been sought will not evaporate in the subsequent proceedings. Because this point was not made clear in the petition for certiorari, it is urged here as a basis for reconsideration of the denial of the writ.

Essential to any plan of reorganization which could possibly be proposed in this case is the question of granting or denying recognition to the claims of the public holders of Kentucky Bonds and Debentures for post-bankruptcy interest. That question will necessarily survive the resolution of any and all other issues which are or may be injected into these proceedings. Moreover, since the dollar amount of the post-bankruptcy interest involved is almost twice as much as the amount of principal involved, and since the Kentucky public creditors

have been unequivocally denied any part of that interest, the ruling below leaves no room for compromise.

Accordingly, a new plan predicated upon the denial of such interest, which the Courts below directed the Trustees to prepare, will inevitably bring back to this Court the issue now presented in the petitions for certiorari, in all respects the same except that it will then be embodied in a plan approved and confirmed in final judgment. The propriety of raising the issue here at that time is beyond dispute. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916); *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 74-75 (1941); *White* v. *Higgins*, 116 F. 2d 312, 317 (1st Cir., 1940). In the circumstances, the denial of certiorari at this time will not serve, as might be true in many other cases of non-final judgments, to remit the proceedings to the District Court with the possibility of the issue on which certiorari was sought dropping out of the case. This eliminates a fundamental premise upon which this Court's denial of certiorari to review non-final judgments normally rests.

To require the issue to ripen into a final judgment in the courts below before this Court will review it is peculiarly at odds with orderly judicial administration in this proceeding. The process of plan formulation, approval and confirmation is a lengthy one. Whether we are right or whether Columbia is right upon the merits, that process must in the present posture of this case be gone through once again. If we are right, the failure to review at this time will require that it be gone through twice. The need for the exercise of this Court's discretionary power now is accentuated by the fact that, although issues as to Columbia's participation in this reorganization vis-a-vis the public creditors of the System have been before the Court below five times, on no two occasions has that Court resolved those issues on consistent premises. Indeed, on

aspects basic to the question here presented that Court has directly contradicted itself in succeeding decisions.*

In the light of this history, we respectfully submit that considerations of sound judicial administration dictate the definitive resolution of the post-bankruptcy interest question by this Court now, rather than its further postponement.

CONCLUSION

We respectfully request that this Court reconsider its denial of the petition for certiorari herein and grant the writ as prayed for.

Respectfully submitted,

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Dated: November 1, 1957.

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* E.g., in 1941 the Court below directed that Columbia's claims be rejected *in toto* (122 F. 2d 223). In 1945 it held that it had been without power to reject, and therefore modified its previous decree to provide for subordination only (151 F. 2d 461, 470; 153 F. 2d 101). In the decision here sought to be reviewed, it held that it had had "authority" to reject Columbia's claims, but that having "declined" in 1945 to do so, in 1957 it was bound by the "bankruptcy rule" to deny post-bankruptcy interest to the Kentucky public creditors (241 F. 2d 374, 382).

Certificate

I hereby certify that the foregoing petition is presented in good faith and not for purposes of delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

November 1, 1957.

CARLOS L. ISRAELS,
Counsel for Petitioner.